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CLIFTON BRYANT, APPELLANT, V. EDMOND E. GREENE, APPELLEE.

80 N. W. 2d 137

Filed December 28, 1956. No. 34032.

1. **Appeal and Error.** If the time for procuring a bill of exceptions is not extended beyond the 40 days allowed by statute, the bill of exceptions must be settled and allowed not later than 70 days from the date of the filing of the notice of appeal in the district court.
2. ———. A trial court is without authority to settle and allow a bill of exceptions not prepared in the manner and within the times fixed by the statute. §§ 25-1140 to 25-1140.07, R. R. S. 1943.
3. ———. In the absence of a bill of exceptions it is presumed that an issue of fact presented by the pleadings was established by the evidence, that it was correctly decided, and the only issue that will be considered on appeal is the sufficiency of the pleadings to support the judgment.

APPEAL from the district court for Douglas County: JAMES M. FITZGERALD, JUDGE. *Affirmed.*

Alfred A. Fiedler and *Ira Epstein,* for appellant.

Robinson, Hruska, Crawford, Garvey & Nye, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CARTER, J.

This is an action for damages for personal injuries caused by the defendant when the latter drove his automobile into and against the person of the plaintiff at a pedestrian crossing at a street intersection in the city of Omaha. The defendant denied any negligence on his part and alleged that the accident was due to the negligence of the plaintiff. Defendant further alleged, without admitting liability, that a payment was made to the plaintiff and a release obtained from the plaintiff in full and complete settlement of any liability on the part of the defendant. In his reply the plaintiff alleged that the release was obtained by fraud and misrepre-

sentation. A trial was had to a jury. At the close of plaintiff's evidence defendant moved for a directed verdict. The motion was sustained and plaintiff has appealed.

We are required to take notice of the fact that there is no proper bill of exceptions filed in this case. The record shows that plaintiff filed his notice of appeal on March 30, 1956. The initial period for reducing his exceptions to writing was 40 days from the date the notice of appeal was filed. § 25-1140, R. R. S. 1943. No extension of time was granted by the trial court as authorized by section 25-1140.07, R. R. S. 1943. The time for reducing the exceptions to writing therefore expired on May 9, 1956. Plaintiff had 10 days to serve the draft of the bill on the adverse party, as provided by section 25-1140.03, R. R. S. 1943. This period ended on May 19, 1956. The defendant then had 10 days to prepare proposed amendments and return the bill to the plaintiff, as provided by section 25-1140.04, R. R. S. 1943. This period ended on May 29, 1956. The bill must thereafter be presented to the court for settlement and allowance within 10 days. § 25-1140.05, R. R. S. 1943. This period ended on June 8, 1956. The bill was not settled and allowed until June 12, 1956. There is no authority for settling and allowing a bill of exceptions more than 70 days after the filing of a notice of appeal when no extension of time has been obtained as authorized by statute and the rules of this court. Jones v. City of Chadron, 156 Neb. 150, 55 N. W. 2d 495. The bill of exceptions must be prepared, served, returned, settled, and allowed in accordance with the statute. Its terms are mandatory. A bill of exceptions which is not prepared in accordance with the statute will be quashed on motion of the adverse party. Neighbors & Danielson v. West Nebraska Methodist Hospital, 162 Neb. 33, 74 N. W. 2d 854. This court will also take judicial notice of the fact that the bill of exceptions was not settled and allowed within the time provided by statute, and

therefore cannot be considered on appeal. Gernandt v. Beckwith, 160 Neb. 719, 71 N. W. 2d 303; Zenker v. Zenker, 161 Neb. 200, 72 N. W. 2d 809; Neighbors & Danielson v. West Nebraska Methodist Hospital, *supra*. In the last case cited, this court examined the statutes with which we are here concerned and carefully prescribed the method for obtaining a proper bill of exceptions. A court rule was therein promulgated to protect diligent litigants against unforeseen hazards. As we said in that case, the statute and the rules of this court implementing it are mandatory. In the present case the proposed draft of the bill was not prepared and delivered to the defendant until May 31, 1956, 22 days after the initial 40 days had expired. The proposed draft of the bill was not settled and allowed until June 12, 1956, 4 days after the trial court's authority to do so had expired. We are required to hold that there is no bill of exceptions before us which can be considered on this appeal.

In the absence of a bill of exceptions the only question remaining is whether or not the pleadings support the judgment of dismissal. Fred Egger Sons v. Welsh, 160 Neb. 124, 69 N. W. 2d 366; Gernandt v. Beckwith, *supra*. In the instant case the trial court directed a verdict because of a want of evidence to make a case. The rule in such a situation is: "In the absence of a bill of exceptions, it is presumed that an issue of fact presented by the pleadings was established by the evidence, that it was correctly decided, and the only issue that will be considered on appeal is the sufficiency of the pleadings to support the judgment." Jones v. City of Chadron, *supra*. The pleadings are sufficient to sustain the order of the trial court. Consequently, the judgment of the district court must be affirmed.

AFFIRMED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1957

HARRY CALVERT, ADMINISTRATOR OF THE ESTATE OF JANICE RAE CALVERT, APPELLEE, V. TED MILLER, APPELLANT.
80 N. W. 2d 123

Filed January 4, 1957. No. 34043.

1. **Automobiles: Negligence.** The legal representative of a deceased guest to recover damages from a host for injury to a guest while riding in an automobile operated by the host must prove by the greater weight of the evidence in the case the gross negligence relied upon and that it was the proximate cause of the accident.
2. **Negligence.** If the evidence in pending litigation respecting gross negligence is not in conflict, the question of its existence is one of law for the court.
3. ———. When the evidence is resolved most favorably toward the existence of gross negligence, and thus the facts are determined, the question of whether or not they support a finding of gross negligence is one of law.
4. **Automobiles: Negligence.** Gross negligence within the meaning of the motor vehicle guest statute means great and excessive negligence or negligence in a very high degree. It indicates the absence of slight care in the performance of a duty.
5. ———: ———. The operation of an automobile at a rate of speed prohibited by law is not in itself gross negligence.
6. ———: ———. The violation of traffic regulations concerning speed, the giving of signals, or other similar regulations is not negligence as a matter of law of any kind or degree but it is a fact that may be considered with other evidence in the case in deciding an issue of negligence.

APPEAL from the district court for Dixon County: ALFRED D. RAUN, JUDGE. *Reversed and remanded with directions.*

Sherman W. McKinley, Jr., and *McEntaffer & Fachman,* for appellant.

Kindig & Beebe, John F. Clemens, and *Donald E. O'Brien,* for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

BOSLAUGH, J.

This litigation results from a tragedy which occurred on the highway between Ponca and Willis on July 11, 1954. The persons directly involved were Gary Miller, 18-year-old son of appellant; and Janice Rae Calvert and Janet Kay Calvert, 15-year-old twin daughters of Harry Calvert and his wife. They left Newcastle about 1 o'clock of the afternoon of that date for a contemplated trip to Sioux City, Iowa. They traveled in a Chrysler automobile operated by Gary Miller. They occupied the front seat of the automobile with Janice Rae Calvert sitting between the driver and her sister. They traveled on Highway No. 12. It had a graveled surface from Newcastle to Ponca and an asphalt or black-top surface about 25 feet wide from Ponca to Willis. The highway extended from the northwest to the southeast. The day was clear, bright, warm, and pleasant. The highway was in good condition.

The trip was uneventful until they were about 3½ miles northwest of Willis. As they traveled southeast toward that town they came to an area of higher ground spoken of in the record as Summit Hill. It was a modest one. The elevation was not great and the distance from the highest part southeastward to the bottom of it was about .15 of a mile. The highway was level from that point east to the place of the accident, a distance of about .35 of a mile.

There were two automobiles, with approximately 30 or 40 feet between them, traveling toward the southeast that were a short distance from the bottom of the hill when the Chrysler car in which the three persons named were riding reached the top of it. The nearest car ahead of the Chrysler car was driven by a Mr. Olsen and the automobile ahead of it was operated by a Mr. Armstrong. The speed of the Chrysler car was greater than that of the other two cars and it came within an estimated 9 or 10 car lengths of the rear of the Olsen car and was moving closer to it. The driver of the Olsen car turned it to the left so that a part of his car crossed the center line of the highway into the lane for northwesterly-bound traffic to enable him to get a view of any traveler approaching from the opposite direction. He desired and intended to pass the Armstrong car. The passing lane was clear of traffic. Olsen did not know there was an automobile approaching his car from the rear until after he had turned to the left across the center of the highway, although there was nothing to have prevented him from seeing the Chrysler car behind him if he had looked. The noise made by the tires on the Chrysler car when the brakes were applied caused Olsen to glance to his left and backward and he saw that car to his left and about 10 feet to the rear. He quickly turned his car to the right into his lane. His version is: "When I heard them tires, why, I whipped back to the right." The Chrysler automobile had, when it was a considerable distance from the Olsen car, commenced a turn to the left into the passing lane when Olsen turned his car to the left with the intention of entering the passing lane. The brakes of the Chrysler were applied and the tires made a noise. Olsen saw the situation and quickly moved back to the right-hand lane of the highway. The tire marks made by the Chrysler car evidence the severity with which the brakes were applied. The skid marks made by the tires showed the car skidded about 160 feet in an at-

tempt to avoid collision with the Olsen car. The Chrysler car traveled sharply to the left and it went off the highway, across a ditch, into a field, turned over more than once, and came to rest on its top about 30 feet from the highway in a field. The occupants of the Chrysler car were severely injured. The injuries suffered by Janice Rae Calvert caused her death at the place of the accident.

The proof of the speed of the Chrysler automobile was an opinion of an expert that it was in excess of 65 miles per hour, testimony without contradiction that the sister of the deceased had stated to appellant that the speed of the car on the day of the accident was 70 miles per hour, and other evidence that the rate of speed was 80 miles per hour and that it was increased going down the hill toward the place of the accident before the brakes on the car were applied.

The deceased, her sister, and Gary Miller had been friends for about 3 years and had frequently gone places by automobile operated by the latter. The deceased and Gary Miller were more often in each other's company and on occasions this was as frequent as 5 nights a week. He had a car of his own and she rode with him and was familiar with his manner of driving. It was known that he habitually drove at a high rate of speed. The only remark made in reference to his manner of driving, so far as the record shows, was at the time it is claimed that he said after they passed Ponca on the day of the accident that they could make Sioux City in a very short time. The sister of the deceased testified concerning this: "I said we weren't in that big of a hurry."

The Olsen car and the Armstrong car were traveling 50 miles per hour. There was no traffic toward the northwest on Highway 12 that was in any way concerned in or contributed to the accident.

Janice Rae Calvert and Janet Kay Calvert were guests of Gary Miller at the time of the accident. The

claim of appellee is that the death of Janice Rae Calvert was proximately caused by the gross negligence of Gary Miller because, as it is alleged, he failed to have proper control of the automobile he was operating, failed to keep a proper lookout, drove at a speed of 90 miles per hour, was unable to avoid a discernible object within the range of his vision, and failed to give a signal of his attempt to pass vehicles traveling in the direction he was going. The liability against appellant asserted by the legal representative of the estate of Janice Rae Calvert, deceased, is that Gary Miller was a minor son and a member of the family of appellant; that Gary Miller was driving the family car owned, provided, and maintained by appellant as a family car for the use and convenience of his family; and it was being so used by his son at the time of the accident. Appellant denied the claims of appellee.

The challenge of the appellant to the sufficiency of the evidence to justify a verdict for appellee by motion for a dismissal of the case at the close of the evidence-in-chief of appellee and by motion for a directed verdict for appellant at the conclusion of all the evidence after the parties had finally rested was denied. The verdict and judgment were for appellee. The motion of appellant for judgment notwithstanding the verdict or for a new trial was overruled. This appeal contests the correctness of the ruling denying the motion and the judgment for appellee.

It is necessary to determine if the proof is sufficient to sustain the finding of the jury in favor of appellee on the issue of gross negligence. The evidence and reasonable inferences therefrom must be considered most favorably to appellee. Rice v. Neisius, 160 Neb. 617, 71 N. W. 2d 116. The legal representative of a guest to recover damages from a host for injury received by a guest while riding in an automobile operated by the host must prove by the greater weight of the evidence in the case the gross negligence of the host re-

lied upon and that it was the proximate cause of the accident and injury. Ottersberg v. Holz, 159 Neb. 239, 66 N. W. 2d 571. The proof in this case intended to establish gross negligence is without substantial conflict as to any material matter and the question of its existence is one of law for the court. When the evidence and its legitimate inferences are resolved most favorably toward the existence of gross negligence, and thus the facts are determined, the question of whether or not they support a finding of gross negligence is one of law. Ottersberg v. Holz, *supra*. Gross negligence within the meaning of the statute means great and excessive negligence; that is, negligence in a very high degree. It indicates the absence of slight care in the performance of a duty. § 39-740, R. R. S. 1943. What amounts to gross negligence in a case depends upon its facts. Ordinary negligence of the operator of an automobile does not justify or permit recovery for injury to a guest of the operator. Rice v. Neisius, *supra*.

The specifications pleaded by appellee that Gary Miller failed to keep a proper lookout and that he attempted to pass a vehicle preceding him on the highway when the passing lane was not clear have no support in the record. There is no proof that he did not have complete control of the automobile he was operating until the Olsen car was suddenly turned to the left and, to some extent, into the passing lane in which the Chrysler car had moved or was entering for the purpose of passing the Olsen car. There is no evidence that Olsen gave any signal or warning that he was intending to change the position of his car and direct it toward or into the lane to his left or that Gary Miller had or could have had any notice or reason to believe that Olsen would do so. The record permits an inference that Gary Miller was justified in assuming that the Olsen car would continue in the right traffic lane of the highway and that it could be safely passed as the operator of the Chrysler car intended and was attempt-

ing to do. Belik v. Warsocki, 126 Neb. 560, 253 N. W. 689. It is a permissible inference from the facts that the cause of the accident was the failure of Olsen to give proper attention to the traffic to his rear and his improper conduct under the circumstances. There is no reason to conclude that the Chrysler car would not have safely passed the Olsen car without incident but for the unfortunate failure and conduct of Olsen as recited above.

There is emphasis on the high rate of speed of the Chrysler car. Excessive or improper speed may be evidence of negligence but excessive speed is not alone gross negligence. Rice v. Neisius, *supra;* Cunning v. Knott, 157 Neb. 170, 59 N. W. 2d 180; Pavlicek v. Cacak, 155 Neb. 454, 52 N. W. 2d 310; Gummere v. Mudd, 139 Neb. 370, 297 N. W. 622. The violation of traffic regulations concerning speed, the giving of signals, the manner of operating a motor vehicle on the highway, and the like is not negligence as a matter of law of any kind or degree but it is a fact that may be considered with the other evidence in the case in deciding an issue of negligence. Born v. Estate of Matzner, 159 Neb. 169, 65 N. W. 2d 593; Rice v. Neisius, *supra.*

The owner or operator of an automobile may not be adjudged liable for injury sustained by a guest on proof that he was negligent. His liability in such an instance arises only when his negligence is of the character defined as gross negligence by the Legislature and the decisions of this court. There is no evidence in the case that Gary Miller was heedless of the safety of his guests, that his negligence was of a very high degree, or that his conduct indicated absence of slight care. The conduct of Gary Miller slowing or stopping the Chrysler automobile near a bridge not far from the location of the accident to permit a truck to precede him across the bridge indicates that he was not heedless of the safety of his guests or that he operated the automobile without even slight care. The situation

portrayed by the record may not reasonably be held to disclose that Gary Miller was guilty of gross negligence within the meaning of the guest statute.

The judgment is reversed and the cause is remanded with directions to the district court of Dixon County to render and enter judgment in favor of appellant and against appellee notwithstanding the verdict of the jury.

REVERSED AND REMANDED WITH DIRECTIONS.

JOHN JONES, APPELLEE, V. HENRY SCHMIDT, APPELLANT.
80 N. W. 2d 289

Filed January 4, 1957. No. 34052.

1. **Courts: Forcible Entry and Detainer.** County courts have jurisdiction of actions for the forcible entry and detainer of real estate.
2. ———: ———. District courts have no original jurisdiction of cases in forcible detainer. The jurisdiction of said courts in such actions is acquired by error proceeding or appeal.
3. **Forcible Entry and Detainer.** The action is merely possessory, and the question of title to real estate cannot be either tried or determined in such case.
4. **Courts: Forcible Entry and Detainer.** An equitable title to real estate and possession thereof may be shown as a defense in an action of forcible entry and detainer. A justice of the peace or a county judge has no jurisdiction to try such a title.
5. ———: ———. Where the title to land, which is sought to be recovered in a forcible detainer case, is drawn in question and evidence thereon is submitted in the county court, the district court, on appeal therefrom, is without jurisdiction to hear and to determine the controversy and, in such case, the action stands for dismissal.

APPEAL from the district court for Cedar County: ALFRED D. RAUN, JUDGE. *Reversed and remanded with directions.*

Leamer & Graham and *Max W. Goetz,* for appellant.

Clarence E. Haley and *Philip H. Robinson,* for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

MESSMORE, J.

This is an action of forcible entry and detainer brought by John Jones against Henry Schmidt in the county court of Cedar County to recover possession of certain land. Trial was had and the county judge entered judgment for the plaintiff. The defendant appealed to the district court. Trial was had to a jury and the jury found the defendant guilty. Judgment was entered on the verdict. The defendant filed a motion for new trial which was overruled. The defendant perfected appeal to this court.

For convenience we will refer to the parties as they were designated in the district court.

The plaintiff filed a petition in the district court for Cedar County alleging that he was the owner and entitled to the immediate possession of certain land which is described in the petition; that on March 1, 1947, the defendant became the lessee of the plaintiff as successor lessee to John V. Schmidt under verbal leases from year to year for such property; that prior to September 1, 1953, the plaintiff notified the defendant that his tenancy would terminate on March 1, 1954, and that he should vacate and surrender possession of the said land to the plaintiff on that date; and that on September 19, 1955, the plaintiff had a written notice served on the defendant to vacate said premises within 3 days after the date of service thereof which period had elapsed, and the defendant unlawfully and forcibly detained possession of said premises from the plaintiff. The petition prayed for restitution of said premises and costs.

The defendant's answer specifically denied that the plaintiff was the owner of the property described in the plaintiff's petition or any part of the same, and that the defendant negotiated a lease with the plaintiff. The defendant's answer then set up certain facts to prove

ownership of the land by adverse possession.

The plaintiff's reply alleged that the defendant, by his answer, sought to alter and change the only issue in the case, namely that of the right of possession of said property, and that the defendant was attempting to resolve this action into one in equity. The plaintiff moved to strike that portion of the answer that set up facts attempting to prove ownership of the land in question by the defendant by adverse possession. This motion was sustained by the trial court.

While the defendant sets forth several assignments of error, the one pertinent to a determination of this appeal is that the verdict is contrary to law.

In cases of forcible entry and detainer such as the instant case there are well-established rules of law which are applicable, as follows.

County courts have jurisdiction of actions for the forcible entry and detainer of real property. See Blaco v. Haller, 9 Neb. 149, 1 N. W. 978.

District courts have no original jurisdiction of cases in forcible detainer. The jurisdiction of said courts in such actions is acquired only by appeal or proceedings in error. See, Armstrong v. Mayer, 60 Neb. 423, 83 N. W. 401; Northwestern State Bank v. Hanks, 118 Neb. 442, 225 N. W. 119.

In an action of forcible detainer, the contest is limited to the naked right of possession. Van Sant v. Beuder, 101 Neb. 680, 164 N. W. 711.

The action is merely possessory, and the question of title to real estate cannot be either tried or determined in such case. Towles v. Hamilton, 94 Neb. 588, 143 N. W. 935.

In an action of forcible entry and detainer the mere filing by the defendant of an answer claiming title to the premises will not deprive a justice of the peace or county judge of jurisdiction. If, however, on the trial it should appear that the action is not in fact for the recovery of the possession of the premises, but to

determine the question of title, the court will have no authority to proceed, and the case must be dismissed. See, Pettit v. Black, 13 Neb. 142, 12 N. W. 841; Lipp v. Hunt, 25 Neb. 91, 41 N. W. 143; Gregory v. Pribbeno, 143 Neb. 379, 9 N. W. 2d 485.

As stated in Northwestern State Bank v. Hanks, *supra*: "Where the title to land, which is sought to be recovered in a forcible detention case, is drawn in question and evidence thereon is submitted in the county court, the district court, on appeal therefrom, is without jurisdiction to hear and to determine the controversy and, in such case, the action stands for dismissal."

This case involves land on what is known as St. Helena Island in the Missouri River within the boundary of Cedar County. The evidence contains aerial photographs of the island and the land in question, the original survey of the island made in 1858, and a survey of the same made in October 1955, and filed of record. Various witnesses identified certain objects on the aerial photographs including the land in controversy, section lines, fences, the Missouri River, and what is referred to by rivermen as the "chute." The action of the Missouri River has cut sharply into the land at one point which is referred to in the evidence as the "neck." The land to the northwest of the neck has been referred to or known as the upper end of the island, and that to the southwest as the lower end. This neck joins the land occupied by the defendant and the lower end of St. Helena Island.

The record discloses that the plaintiff John Jones, also referred to in the evidence as Jack Jones, is 61 years of age, was born on St. Helena Island, and spent most of his life on the island. In the late 1890's his father moved a mill off the island to the town of St. Helena. In 1926 and 1927, the plaintiff's mother was in possession of the island and rented part of it for pasture. What is referred to as the "upper" part of the island, the land in controversy in this case, in 1926 was

nothing but pasture land. It was difficult to grub this land out for farming because the work had to be done by hand. The plaintiff lived on what is known as the "lower" end of the island. He testified that this land is continuous between the lower and upper ends of the island. From 1926, they were always able to drive from the house on the lower end of the island to the upper end of the island onto the land in controversy. In 1931 and 1932, plaintiff's brother Joe Jones looked after the land for the plaintiff's mother and rented pasture land. The plaintiff and his wife moved onto the island in 1933, and took over renting the land in 1934. The plaintiff claimed he made a verbal lease of the land in controversy with John Schmidt in 1934. The plaintiff testified that the agreement was that John Schmidt was to go onto the land, break some of it up, farm it, look after it for the plaintiff, and in return he could keep the crop; and that John Schmidt entered the land under that agreement. The following years the plaintiff checked with him, made several visits to the property, and observed that he had done some clearing of brush and trees. In 1936, the plaintiff pastured 180 head of cattle belonging to himself and other persons on this land, and at that time he observed John Schmidt farming the land. The same year the plaintiff put some fence on the land to keep the cattle out of John Schmidt's corn. The plaintiff further testified that in 1947, John Schmidt told the plaintiff that he had purchased some land from the box factory and wanted to discontinue his lease. In August 1947, the plaintiff stopped at the defendant's place and had a conversation with him about renting this land. He made a deal with Henry Schmidt on the same terms as the deal with his brother John Schmidt. Henry Schmidt took possession of the land. During 1947 and subsequent years, the plaintiff made visits to the upper end of the island. He further testified that there was a chute on the south side of the island which at one time was one of the main channels

of the Missouri River. In the fall of 1948, the plaintiff was doing some custom threshing and crossed the chute at the same place that Henry Schmidt crossed it. After a flood in 1952, the chute was filled up with debris and not useful as a navigable stream. In 1953, the plaintiff had a conversation with one of Henry Schmidt's sons to the effect that Henry Schmidt, the defendant, was going to claim this land as his own. As a result of the conversation the plaintiff and his wife went to the defendant's home. The defendant, his wife, and other members of his family were there. The plaintiff told the defendant the purpose of the visit. He had a lease that he wanted the defendant to sign. The defendant refused to sign the lease. The plaintiff told him that he was going to farm the land himself, and wanted possession March 1, 1954. The defendant did not yield possession, so on September 19, 1955, a notice to quit was served on the defendant.

On cross-examination the plaintiff testified that the first time he saw the defendant working on this land was in 1947; that he had been on the land several times prior to 1947; that the only cattle he saw on the land were his own; and that he never saw the defendant clear any of this land until after 1947. Only during the last year or so did he see some alfalfa growing on the land, and in the last 2 or 3 years he saw some pigs that belonged to the defendant on the land. There was a 12 by 16 foot house covered with asphalt shingles moved onto the land by John Schmidt, and a shed built of willows and straw. The fields in 1944 were open, with no fences around them. The first fence was built in 1947 or 1948. The defendant put in a few fences, and as far as the plaintiff knew, they belong to the defendant, except a short piece of fence across the west side of the neck which belongs to the plaintiff.

A nephew of the plaintiff testified that during 1933 and through 1941, he farmed some land on St. Helena Island proper, and John Schmidt farmed land west of

the neck. Up until 1941, he never heard about, nor did he see, the defendant farm the land in controversy.

The wife of the plaintiff corroborated his testimony with reference to the plaintiff presenting the lease to the defendant at the defendant's home and the defendant's refusal to sign it.

The defendant testified that he was 64 years old, and lived northwest of St. Helena where he had lived all of his life. The first time he occupied the land in controversy was in 1927. Speaking of the chute, he testified that it comes in from the north and heads toward the south, running generally southeast. The neck of the chute is the southeast corner of the land he claimed. There is a fence that he put in in the late 1930's, and there is a fence along the chute on the north side that he has maintained at all times. He started to clear the land in 1934, with the help of his wife, and built fences around the fields to keep the cattle confined. In 1927, he kept 10 or 15 head of cattle on this land. He also had horses on this land. In 1927, the island was nothing but sand. There were a lot of willows, and some grass and sweet clover on the land. He has fenced in each field that he cleared, and has somewhere near 8 miles of fence on this land. In 1937, he moved a plow shed on this land and used it for a cook shack and shelter. In 1947, he built a cow shed of poles and straw. He moved a hog shed from his home place onto the land, and in the late 1940's he built a 14 by 44 foot house on the land, which he finished on the inside. In the construction of the house he used sheet rock and lumber. In the late 1940's he also dug a well on this land. In 1927, there were no roads on the land, and there are now roads that run up and down the bar to the neck and to each field on the land with a well-worn track. In 1927, he did not ask anybody about going onto this land, he just went on it and took it over. There were no buildings on it, no fields were cleared off, and no one was pasturing the land or using it as their own. The only

times the plaintiff was on this land that he could remember was when the plaintiff and his first wife came there one time, and the second time when the plaintiff and his second wife came to his place to ask him to sign a lease, which he refused to sign. The plaintiff demanded that the defendant pay him $10 or $15, which the defendant refused to do. He saw the plaintiff a couple of days later. He had a trespass sign which he put along the side of the road where the defendant would go into the upper end of the island. The plaintiff said he wanted the defendant to stay out. The defendant further testified that he never saw the plaintiff clear any of the land in question nor build any fences or buildings on it. He denied having a lease with the plaintiff or any other person, and claimed to be the owner of the land and had occupied it since 1927.

John Schmidt testified that he started farming on St. Helena Island in 1930. He rented the land from Joe Jones and Mrs. Jones, and had a rental agreement in 1932, 1933, and 1934. In 1933, the chute gradually filled up between the islands. The land he rented was not the land now in controversy, and he did not farm such land. He also rented land from other parties. He farmed the land on St. Helena Island proper from 1930 to 1945. The plaintiff did not make a lease of any kind with him for the land in controversy, and from 1930 to 1945, he did not pay the plaintiff any rent for such land. The defendant was farming this land at that time, and at the same time this witness was farming land down on St. Helena Island. The defendant started farming this land in 1934, built fences on it, and used the pasture thereon from 1927. He traveled over this land after 1934 to get to St. Helena Island, with the defendant's permission. He never saw the plaintiff on the land in controversy except one time when he went up with a tractor to have this witness help to take the tractor across the chute. He never asked the plaintiff to have the defendant take over a lease.

A nephew of the defendant testified that he and John Schmidt were on the land in controversy in 1931, and helped to construct the boundary line fence that separated the land of his father, George Schmidt, from the land occupied by the defendant. In 1938, he was on the land in controversy and observed the defendant working the land. Small patches of the land had been cleared in 1934. He never saw the plaintiff on this land from 1931 to 1938, nor did he see John Schmidt farming this land during any of that time.

Another witness testified that the first time he was on this land in controversy was in 1930, at which time his father had traded saddle horses with the defendant. He observed that there were cattle on the land at that time. He was on the land several different times from 1930 to 1936, and observed the defendant clearing the land, but did not observe the plaintiff farming it.

The defendant's wife corroborated the testimony of the defendant with reference to the presentation of the lease by the plaintiff to the defendant for the purpose of having it signed, which the defendant refused to do. She testified that her husband ran cattle on this land in 1927, and she helped to drive the cattle onto the land; that the land has always been farmed as their own land; that they never paid rent to anybody, but continued to claim it as their own land; and that they were not bothered until 1953, when the plaintiff presented the lease. She helped to clear the land and plant crops of corn, alfalfa, oats, sweet clover, and popcorn. She further testified that the plaintiff had never farmed any land north or to the west of the neck, and neither had John Schmidt; and that she and her husband cleared all of the land north and west of the neck and claimed ownership of it.

In addition to the before-cited authorities, the following is also applicable in the instant case.

Any evidence tending to show which party is entitled to possession, whether it be title deeds or other written or oral testimony, should be considered. But a justice

of the peace, and also a county judge, can try only the right of possession. If that right depends upon some right of defendant, whether legal or equitable, in the property itself, he must dismiss the action for want of jurisdiction. See Stone v. Blanchard, 87 Neb. 1, 126 N. W. 766.

There is competent evidence tending to show that there is in fact a title to real estate in question tendering a genuine issue which the parties are entitled to have adjudicated.

For the reasons herein given, the judgment entered on the verdict should be, and is hereby, reversed, and the cause remanded with directions to dismiss the action.

REVERSED AND REMANDED WITH DIRECTIONS.

GALE MALONE, APPELLANT, V. LUCILLE MALONE, APPELLEE.
80 N. W. 2d 294

Filed January 11, 1957. No. 34058.

1. **Divorce.** The fixing of the amount of alimony rests, in each case, upon the sound discretion of the court.
2. ———. Even though the cross-petition of a wife is denied and an absolute divorce granted the husband, the wife may be granted reasonable alimony within the limitations of section 42-318, R. R. S. 1943.
3. ———. In determining the question of alimony or division of property as between the parties the court, in exercising its sound discretion, will consider the respective ages of the parties to the marriage; their earning ability; the duration of and the conduct of each during the marriage; their station in life, including the social standing, comforts, and luxuries of life which the wife would probably have enjoyed; the circumstances and necessities of each; their health and physical condition; and their financial circumstances as shown by the property they owned at the time of the divorce, its value at that time, its income-producing capacity, if any, whether accumulated or acquired before or after the marriage, the manner in which it was acquired, and the contributions each has made thereto and, from all the relevant facts and circumstances relating thereto, de-

termine the rights of the parties and make an award that is equitable and just.

4. ———. The fee allowed for the service of an attorney for a woman in a divorce action should be sufficient to adequately compensate for the service necessary to be performed.

APPEAL from the district court for Hayes County: VICTOR WESTERMARK, JUDGE. *Affirmed in part, and in part reversed and remanded with directions.*

Charles M. Bosley and *Robert C. Bosley,* for appellant.

Stevens & Scott, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

WENKE, J.

This is an appeal from the district court for Hayes County. It involves a divorce proceeding in which Gale Malone, plaintiff below, appealed to this court from a decree granting him an absolute divorce from Lucille Malone on the grounds of extreme cruelty.

Questions raised by appellant on appeal relate to the trial court's division of the parties' property and the amount allowed for attorney fees. Trial was had on April 16, 1956, and, unless otherwise specified, the facts referred to relate to the conditions as they existed at that time.

We have examined the record and find it sufficient to support the grounds on which the divorce was granted.

Appellant and appellee were married on Easter Sunday in 1936 at Cambridge, Nebraska. Seven children were born to this marriage, one dying in infancy. The living are Evelyn L., a daughter, born December 26, 1936; Alta Mae, a daughter, born January 11, 1939; Gary D., a son, born May 31, 1942; Connie J., a daughter, born July 19, 1945; Bonnie J., a daughter, born January 10, 1947; and Nancy G., a daughter, born July 17, 1949. Evelyn is teaching school and no longer lives at home.

Appellant was born and raised on a farm. He is 44

years of age. He had engaged in farming and ranching operations for some 7 years prior to his marriage. As a result he had acquired horses, other livestock, and machinery worth about $5,000 which, at the time of his marriage to appellee, he owned free of debt. During the first 8 years of their married life the parties lived on a farm near Oxford, Nebraska. In the spring of 1944 they moved onto a 2,800-acre ranch, which they had purchased, that is located northwest of Palisade in Hayes County. It consists of 2,680 acres of deeded land and a lease on 120 acres of state school land. They have made their home on this ranch ever since, improving it in many ways, including sprinkler irrigation. At present it is a well-improved ranch, especially the home. The latter is modern in every respect. We shall refer to this ranch as the home ranch.

Appellant appears to have been and is a very successful farm-ranch operator, although such operations have not been very profitable for the last 3 years because of poor crops and declining livestock prices. In addition to the home ranch the parties purchased a 320-acre tract, consisting almost entirely of farm land, and a 753-acre tract, consisting mostly of ranch land. Both of these are being used in connection with the home-ranch operations. The parties have accumulated property, both real and personal, having a net valuation somewhat in excess of $100,000. They owe a total of about $54,500. These obligations include a $15,000 mortgage on the 320-acre tract, a $11,500 mortgage on the 753-acre tract, and a $19,400 chattel mortgage on the livestock and machinery. The balance of these obligations consist of open accounts.

The trial court gave the care, custody, and control of the children to appellee, granting appellant permission to visit them at reasonable times. Appellee, who is 38 years of age, appears to be a suitable person to have the care of these children. To provide for their care, the trial court ordered appellant to pay the sum

of $50 per month for each of said children until they respectively arrive at the age of 18 years, same to commence on May 1, 1956, that is, payments for the support of each child is to cease when the child reaches the age of 18. No objection is made by appellant to these payments and the record fully supports the trial court's granting appellee their care and custody. We do think, however, there should be some change made in relation to appellant's rights as they relate to the son. It appears the children all get along very well with the father and that the son likes to be out on the ranch with him. In view thereof, and his age, we think Gary should be given the privilege, if he cares to do so, to be with his father during summer vacations.

The trial court gave appellee the home ranch, which is clear and valued between $66,000 and $70,000; a Buick car worth about $1,900; and the household furniture and furnishings in the ranch home, which cost between $8,000 and $9,000, but directed her to pay appellant $12,000 at the rate of $1,000 per year commencing March 1, 1957. Appellant was given all other property, including livestock and machinery, but was required to pay all debts, including both real and personal taxes for 1955.

It is this division of the property of which complaint is made by appellant. We have often said the fixing of the amount of the alimony rests, in each case, upon the sound discretion of the court. Holmes v. Holmes, 152 Neb. 556, 41 N. W. 2d 919.

Even though the cross-petition of a wife is denied and an absolute divorce granted the husband, the wife may be granted reasonable alimony within the limitations of section 42-318, R. R. S. 1943. See Phillips v. Phillips, 135 Neb. 313, 281 N. W. 22.

The elements to be considered in a case of this character have often been announced by this court. As stated in Nickerson v. Nickerson, 152 Neb. 799, 42 N. W. 2d 861: "In determining the question of alimony

or division of property as between the parties the court, in exercising its sound discretion, will consider the respective ages of the parties to the marriage; their earning ability; the duration of and the conduct of each during the marriage; their station in life, including the social standing, comforts, and luxuries of life which the wife would probably have enjoyed; the circumstances and necessities of each; their health and physical condition; and their financial circumstances as shown by the property they owned at the time of the divorce, its value at that time, its income-producing capacity, if any, whether accumulated or acquired before or after the marriage, the manner in which it was acquired, and the contributions each has made thereto and, from all the relevant facts and circumstances relating thereto, determine the rights of the parties and make an award that is equitable and just." See, also, Specht v. Specht, 148 Neb. 325, 27 N. W. 2d 390; Martin v. Martin, 145 Neb. 655, 17 N. W. 2d 625.

The record shows both parties actively helped to run the home ranch while this property was being acquired and that it was accumulated through their joint efforts. We think the amount granted appellee is excessive and that the division made by the trial court is not very realistic, taking into consideration the future payments necessary to support these children which we think is of primary importance. To give her an unstocked ranch would force her to either rent it to others, which is not desirable under all the circumstances shown, or go into debt to buy livestock and machinery with which to operate it with no assurance that she can successfully make it go. On the other hand it leaves appellant without sufficient land for a successful ranch operation and so badly in debt that it raises a serious doubt if even he can make it go, although the record shows he has been very successful in that field. We think it would be better to fix appellee's financial condition so that she can devote her time to raising the children, the

record showing she is doing a good job of that, and leave appellant to operate the home ranch and, out of the proceeds thereof, provide for appellee and the children.

We order the child support allowance of $50 per month for each child, until such child reaches the age of 18 years, be left in full force and effect from May 1, 1956. All other provisions relating to the parties' property are set aside. We order, in lieu thereof, as follows: That appellant place on deposit with the clerk of the district court of Hayes County the sum of $10,000 to be used by appellee for the purpose of buying and furnishing a home for herself and the children, she to select the location thereof, but she is not to sell or encumber such property while it is being used as a home for the children. However, on the date the youngest of the children becomes 18 years of age it is to become hers absolutely. In order to assist her in furnishing this home she is to have as much of the furniture now in the house on the ranch, which she is presently occupying, as is necessary for that purpose but she is not to take any of the furnishings therefrom such as carpeting, linoleum, shades, drapes, and built-in utilities. The latter would include such items as electric stoves, washers, dryers, etc. After the money for this purpose has been deposited in the bank appellee shall have 45 days thereafter in which to buy and furnish a home and may stay in the ranch house during that period of time if she so desires. Appellee is also to have the Buick car and, in addition thereto, alimony in the sum of $28,000, payable on the first of each month as follows: From and including May 1, 1956, to and including January 1, 1957, $100 per month; from and including February 1, 1957, to and including May 1, 1960, $150 per month; from and including June 1, 1960, to and including July 1, 1963, $200 per month; from and including August 1, 1963, to and including January 1, 1965, $250 per month; and from and including February 1, 1965, to and including July 1, 1967, $300 per month.

None of the payments are to draw interest until in default and all child support and alimony payments are to be made by appellant to the clerk of the district court of Hayes County for the benefit of appellee. This arrangement will give appellee $350 a month until the youngest child has reached the age of 18 years.

It appears that a gas and oil lease has been placed on the land owned by the parties and there is a possibility that royalties may be received from that source. If any gas or oil royalties are received by appellant during the period, up to and including July 31, 1967, he shall pay to appellee 25 percent of all amounts received from that source during that period.

As to appellant he is to retain all of the property owned by the parties, except that herein specifically given appellee; deposit the $10,000 with the clerk of the district court for appellee's benefit; pay all debts; and make the payments of child support and alimony herein provided.

The trial court allowed an attorney's fee of $2,000. Appellant complains of this as being an excessive allowance. We have said: "The fee allowed for the service of an attorney for a woman in a divorce action should be sufficient to adequately compensate for the service necessary to be performed." Nickerson v. Nickerson, *supra.*

We think, considering all matters involved, particularly the duration of the trial and the issues involved, that the amount allowed is somewhat excessive. We will not set it aside, however, but will not allow any additional fees here, thus finding the amount allowed to be adequate for service in both this and the trial court.

In view of what we have said we affirm the decree insofar as it grants appellant an absolute divorce, awards the care and custody of the minor children to appellee, directs appellant to pay for their care and the amount fixed for that purpose, and allows appellee an attorney fee of $2,000. We set aside and vacate the

decree insofar as it relates to alimony and to the division of the parties' property with directions to the trial court to enter a decree in relation thereto in accordance with what is specifically set forth herein. We also direct the trial court to modify its decree so as to provide that the son, Gary, may stay with his father on the ranch during the summer months, if he so desires. Costs, including attorney fees herein approved, are taxed to appellant.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

JAMES A. SUTTON, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

80 N. W. 2d 475

Filed January 11, 1957. No. 34067.

1. **Criminal Law: Juries.** Unless otherwise provided by statute, one charged for a statutory misdemeanor has the right to demand a trial by jury in the county where the offense is alleged to have been committed but may waive his right thereto.
2. ———: ———. The right of trial by jury having been voluntarily waived by the accused, he thereafter has no right or power at his mere will to withdraw or revoke his waiver and demand a jury trial.
3. ———: ———. Whether one accused of crime who has regularly waived a jury trial will be permitted to withdraw the waiver and have his case tried before a jury is ordinarily within the discretion of the trial court.
4. **Courts.** It will be presumed, in the absence of a showing to the contrary, that the discretionary powers of the district court have been wisely exercised.
5. **Courts: Appeal and Error.** Abuse of discretion cannot be presumed, but must be made to appear by evidence before its existence can be found by an appellate court. The burden of showing an abuse of discretion rests on the appellant or plaintiff in error.

ERROR to the district court for Dodge County: RUSSELL A. ROBINSON, JUDGE. *Affirmed.*

Spear, Lamme & Simmons, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Ralph D. Nelson,* for defendant in error.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CHAPPELL, J.

On November 18, 1955, a complaint was filed by the State in a justice of the peace court of Dodge County charging plaintiff in error, James A. Sutton, hereinafter called defendant, with speeding on November 8, 1955, in violation of section 39-723, R. R. S. 1943. On November 18, 1955, the defendant appeared in that court with counsel and requested a jury trial. Thereupon the cause was set for jury trial on December 1, 1955. Defendant then appeared with counsel and upon trial to a jury defendant was found guilty and the court assessed a fine of $20 and costs.

Therefrom defendant appealed to the district court where the cause was set for trial to a jury on January 18, 1956. At that time defendant appeared with counsel and voluntarily waived a jury trial.

At request of defendant and upon the basis of defendant's waiver, the cause was then continued until the April term of court for trial without jury. Thereafter the cause came on for trial on April 17, 1956, without a jury, whereat defendant appeared with counsel, waived reading of the complaint, and pleaded not guilty. Also, just before trial defendant's counsel asked to withdraw defendant's former waiver of jury trial, objected to trial without a jury, and renewed his motion for a jury trial. In his brief filed in this court, defendant states that: "On or about April 15 defendant's attorney told the county attorney and judge that he was withdrawing his waiver and requested a jury trial." However, we find nothing in the record to support that statement.

Be that as it may, the court "denied request of defendant to withdraw waiver of jury trial," and overruled defendant's motion for trial by jury. After trial to the court upon the merits without a jury, defendant was found guilty and assessed a fine of $20 and costs.

Defendant's motion for new trial was subsequently overruled and he prosecuted error to this court, assigning that: "The district court erred in denying defendant's motion for trial by jury after defendant had waived jury trial." In the light thereof, the sole question argued and submitted is whether or not the trial court erred prejudicially in denying defendant's request to withdraw his waiver of jury trial and in overruling defendant's motion for trial by jury. We conclude that the court did not err in so doing.

In Peterson v. State, 157 Neb. 618, 61 N. W. 2d 263, we held that: "Unless otherwise provided by statute, one charged with a statutory misdemeanor has the right to demand a trial by jury in the county where the offense is alleged to have been committed but may waive his right thereto."

An applicable rule is that the right of trial by jury having been voluntarily waived by the accused, he thereafter has no right or power at his mere will to withdraw or revoke his waiver and demand a jury trial. State v. Bannock, 53 Minn. 419, 55 N. W. 558.

As stated in Annotation, 46 A. L. R. 2d 920, citing and discussing numerous cases: "Whether one accused of crime who has regularly waived a jury trial will be permitted to withdraw the waiver and have his case tried before a jury is ordinarily within the discretion of the trial court." See, also, 50 C. J. S., Juries, § 111 b, p. 825, and cited authorities. The authorities cited in the foregoing texts point out the elements which must appear in the record in order to be considered by the appellate court in each individual case to determine whether or not the trial court abused its discretion in refusing to permit withdrawal of waiver of a jury and

refusing to grant a jury trial. To enumerate them here would serve no purpose. It is sufficient to say that defendant herein made no affirmative showing with relation thereto. He simply sought to withdraw the voluntary waiver at his mere will, which he had no right or power to do.

As held in Waldron v. First Nat. Bank of Greenwood, 60 Neb. 245, 82 N. W. 856: "It will be presumed, in the absence of a showing to the contrary, that the discretionary powers of the district court have been wisely exercised."

Further, in 3 Am. Jur., Appeal and Error, § 960, p. 525, it is said: "The burden of showing an abuse of discretion rests on the appellant or plaintiff in error." In the 1956 Cumulative Supplement thereto, at page 86, the following is inserted immediately prior to the sentence just quoted: "Abuse of discretion cannot be presumed, but must be made to appear by evidence before its existence can be found by an appellate court."

The record in the case at bar discloses no evidence adduced by defendant which could sustain a conclusion that the trial court abused its discretion in refusing to permit him to withdraw his waiver of jury trial or in denying him a jury trial. The record simply shows that just before trial, when represented by counsel, "Defendant asked to withdraw waiver of jury trial," which was denied, and at the beginning of the trial his counsel said: "The defendant at this time objects to the trial of this case without a jury and renews its motion for trial by jury," which motion was overruled and trial proceeded to the court without a jury. In such respect, no reason whatever was given or cause shown by defendant which would justify a withdrawal of his waiver of jury trial.

In State v. Rankin, 102 Conn. 46, 127 A. 916, which presented a comparable situation in material respects, the court in an opinion affirming the trial court's refusal to permit defendant to withdraw his election to be tried

by the court instead of by a jury said: "No reason was given or cause shown for the withdrawal of the election. * * * No facts appear upon this record indicating any ground for the withdrawal of the election of the accused to be tried by the court." The statement has application here.

Also, in People v. Haddad, 306 Mich. 556, 11 N. W. 2d 240, which presented a comparable situation in material respects, the court in an opinion affirming the trial court's denial of trial by jury said: "To grant this request would have merely resulted in a continuance until a jury was present, at which time the defendant again might have waived a jury trial, as he would have the right to do. Carried to the extreme, such a procedure would delay trial indefinitely. With each change from jury to nonjury docket, or vice versa, the accused might reverse his position * * * to delay trial. In this case, six months had elapsed since the defendant had waived jury trial, and nearly a year since his arraignment. The orderly procedure of courts for the prompt trial of criminal cases does not require more than was done by the court in this case. Defendant's constitutional rights were not violated." The statement has application here.

For reasons heretofore stated, we conclude that the trial court did not abuse its discretion in denying defendant's request to withdraw his waiver of jury trial and in overruling defendant's motion for trial by jury. The judgment and sentence of the trial court, which are supported by competent evidence, should be and hereby are affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. JAMES L. WEASMER, COMMISSIONER OF LABOR, APPELLANT, V. MANPOWER OF OMAHA, INC., ET AL., APPELLEES.

80 N. W. 2d 580

Filed January 18, 1957. No. 34046.

1. **Appeal and Error.** Where a record contains no authentic bill of exceptions or the bill of exceptions has been quashed, no question will be considered, the determination of which necessarily involves an examination of the evidence adduced in the trial court, and in such situation, if the pleadings are sufficient to support the judgment it will be affirmed.
2. **Judgments.** The general rule is that a person relying upon the doctrine of res judicata as to a particular issue involved in a pending case bears the burden of introducing evidence to prove that such issue was involved and actually determined in the prior action.
3. ———. Judicial notice will not be taken of a judgment in another suit as res judicata, whether in the same court or another court, when not pleaded or given in evidence.
4. ———. Any right, fact, or matter in issue directly adjudicated or necessarily involved in the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies, whether the claim or demand, purpose, or subject matter of the two suits is the same or not.
5. ———. A judgment will not operate as res judicata unless it appears on the face of the record, or is shown by extrinsic evidence, that the precise question was raised and determined in the former suit.
6. ———. Whether a former judgment is a bar to an action ordinarily depends on whether the same evidence will sustain both the present and the former action, and when it appears that different proof is required, a judgment in one of them is no bar to the other.
7. **Appeal and Error.** In the absence of a bill of exceptions it is conclusively presumed that the findings of fact made by the trial court were supported by the evidence.

APPEAL from the district court for Douglas County: PATRICK W. LYNCH, JUDGE. *Reversed and remanded.*

Clarence S. Beck, Attorney General, and *Richard H. Williams,* for appellant.

Edmund R. Sturek, for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

YEAGER, J.

This is an action in equity instituted by the State of Nebraska on relation of James L. Weasmer, Commissioner of Labor, relator and appellant, against Manpower of Omaha, Inc., a corporation, and Leo E. Ogle, respondents and appellees, the purpose of which was to enjoin the respondents from operating an employment agency without compliance with the statutes requiring employment agencies to obtain a license to operate such an agency.

The action was tried to the court, and at the conclusion of the evidence for the appellant, on motion of the appellees, the action was dismissed with prejudice. The ground of the dismissal was that the facts, questions, rights, matters, and issues had previously been adjudicated in another action between the parties. From the judgment of dismissal this appeal has been taken by the appellant.

The appellant as grounds for reversal asserts: (1) That the court erred in dismissing the action and in refusing to grant an injunction; (2) that the court erred in its holding that the questions, rights, matters, and issues had been previously determined and adjudicated; and (3) that the judgment was contrary to the law and to the evidence.

By fragmentary reference the record in this case calls the attention of this court to the case of State ex rel. Weasmer v. Manpower of Omaha, Inc., 161 Neb. 387, 73 N. W. 2d 692, decided by this court, which was a case between the relator here and the appellee, Manpower of Omaha, Inc. From this reference it becomes possible to take judicial notice of certain matters in that case. In the light of the matters of which judicial notice may be taken and the present record the follow-

ing appears to present the basis for the determination to be made in this case.

In the former case the relator on July 2, 1954, filed a petition wherein it was substantially charged that Manpower of Omaha, Inc., was at the time the petition was filed and prior thereto engaged in the maintenance and operation of an employment agency as defined by section 48-501, R. R. S. 1943, without first procuring or taking out a license therefor as required by law.

Manpower of Omaha, Inc., filed an answer in the case. By the answer maintenance and operation of an employment agency was specifically and generally denied. The question of whether or not Manpower of Omaha, Inc., was engaged in the maintenance and operation of an employment agency in violation of law was the only issue presented by the pleadings.

After the evidence had been adduced in that case a decree was rendered dismissing the petition. The dismissal was based upon a finding that Manpower of Omaha, Inc., was not an employment agency within the purview of the Nebraska statutes.

From the decree the relator therein appealed to this court. On the appeal this court was denied the right to review the facts upon which the decree was based because of the fact that no proper bill of exceptions was presented. This court had only the pleadings and the decree for consideration. The rule which was applied under the circumstances by this court is the following: "Where the record contains no authentic bill of exceptions or the bill of exceptions has been quashed, no question will be considered, the determination of which necessarily involves an examination of the evidence adduced in the trial court, and in such a situation, if the pleadings are sufficient to support the judgment, it will be affirmed." Dryden & Jensen v. Mach, 150 Neb. 629, 35 N. W. 2d 497. See, also, Adkisson v. Gamble, 143 Neb. 417, 9 N. W. 2d 711; Ratay v. Wylie, 147 Neb. 201, 22 N. W. 2d 622; Benson v. General Implement Corp.,

151 Neb. 234, 37 N. W. 2d 223; Horn v. Gooch Feed Mill Co., 157 Neb. 125, 58 N. W. 2d 626.

In application of this rule this court effectually found that there was no evidence to be considered in proof of the pleaded cause of action. It further effectually held that the denial in the answer of the allegations of the petition was sufficient to support the judgment. Accordingly the judgment was affirmed.

This is the theory upon which the opinion was written as is made clear by the following from the opinion: "Having examined the allegations of fact in the petition filed in the district court and the statutes in question it is our opinion that on strict construction of the statutes or otherwise, if the allegations of the petition were sustained by evidence sufficient in degree to support a decree, that the decree of the district court was erroneous.

"It appears that the acts charged against the respondent were violative of the clear, specific, and unambiguous language of both sections 48-501 and 48-502, R. R. S. 1943."

On January 3, 1956, the appellant herein filed the petition which was the basis of the commencement of this action. The petition is in all substantial particulars the same as the one in the former action with two exceptions. One is that Leo E. Ogle was named as an additional respondent. This however is of no significance in the determination of the questions presented. The other is that the petition substantially charges that at the time the petition was filed and prior thereto the respondents were engaged in the maintenance and operation of an employment agency as defined by sections 48-501 and 48-502, R. R. S. 1943, without first procuring or taking out a license therefor as required by law.

To the petition the appellees filed an answer. To the extent necessary to state its contents it specifically and generally denied that they were maintaining and op-

erating an employment agency as charged. It alleged that this case was predicated upon the same facts as the earlier case, in consequence of which the judgment in that case, which was affirmed by this court, is res judicata here, and therefore they were entitled to a dismissal of this action with prejudice. A cross-petition was also filed but it is of no concern at this time. A reply in the nature of a general denial was duly filed.

On the issues thus made the case came on for trial. The appellant adduced its evidence and rested. After the appellant rested the appellees moved for a dismissal on the ground "that the relator has wholly failed to sustain the burden to prove a cause of action, in that the evidence of the relator's case in chief very clearly and admittedly discloses that the ajudication (sic) previously made by this court in the case of the State of Nebraska on the relation of James L. Weasmer, Commissioner of Labor, Relator vs. Manpower of Omaha, Inc., Respondent * * * is a complete adjudication of the facts and issues involved in the case now at bar." The motion was thereupon taken under advisement. This occurred on March 15, 1956.

On April 20, 1956, the court sustained the motion to dismiss. It was from this order that the appeal was taken to this court.

The petition was, as has been pointed out, in all substantial particulars except as to date or time of acts charged, the same as those involved in State ex rel. Weasmer v. Manpower of Omaha, Inc., *supra*. In the opinion in that case it was held that if there was evidence sufficient to sustain the allegations of the petition it would be necessary to say that the relator had sustained the pleaded cause of action. In this case examination discloses that there is evidence sufficient to sustain the petition, hence there was no basis for sustaining the motion on the ground that the appellant had not sustained its evidentiary burden.

As to the question of whether or not the court prop-

erly sustained the motion on the ground that the question presented had been determined and adjudicated previously and was not subject again to trial, an answer is that at the time and under the circumstances of making, the motion was premature.

In Schroeder v. Homestead Corp., *ante* p. 43, 77 N. W. 2d 678, this court said: "The general rule is that a person relying upon the doctrine of res judicata as to a particular issue involved in the pending case bears the burden of introducing evidence to prove that such issue was involved and actually determined in the prior action." See, also, 30 Am. Jur., Judgments, § 283, p. 997; Wilch v. Phelps, 16 Neb. 515, 20 N. W. 840.

In the same opinion it was said: "Judicial notice will not be taken of a judgment in another suit as res judicata, whether in the same court or another court, when not pleaded or given in evidence." See, also, Pickens v. Coal River Boom Co., 66 W. Va. 10, 65 S. E. 865, 24 L. R. A. N. S. 354; United States v. Bliss, 172 U. S. 321, 19 S. Ct. 216, 43 L. Ed. 463.

In this case the appellees did not satisfy the burden imposed upon them of adducing evidence to prove that the issues presented in this case were involved and actually determined in the former case. Likewise there is nothing of which judicial notice may be taken since the judgment in the case was not "given in evidence."

In the present case the appellees adduced no evidence whatever. It is apparent that appellees are proceeding on the theory that the evidence of appellant demonstrates that the judgment in the former case is res judicata here in consequence of which the burden of appellees has been satisfied.

This theory cannot be accepted. From an evidentiary viewpoint there is nothing in the record here descriptive of the issues which were presented in the former case. The only legal information that this court has as to the existence of the former case comes through a stipulation or stipulations in the present record identifying

that case. The only legal knowledge that this court has as to the issues which were present flows from an examination of the records of this court based upon the identification thus made and the opinion written in that case. From the information thus obtained it must be said that the motion on the ground on which it was sustained was premature, it being without any evidentiary support.

Assuming however that the record is in such condition as to make proper a motion for dismissal on the ground that the former judgment was res judicata, the finding that it was so res judicata could find no support in the record which has come to this court.

It is of course true that any right, fact, or matter in issue directly adjudicated or necessarily involved in the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether the claim or demand, purpose, or subject matter of the two suits is the same or not. See, Reinsch v. Pacific Mutual Life Ins. Co., 140 Neb. 225, 299 N. W. 632; Glissmann v. Bauermeister, 149 Neb. 131, 30 N. W. 2d 649; Glissmann v. Orchard, 152 Neb. 500, 41 N. W. 2d 756.

Under this rule of course the matters and issues upon which the adjudication was made in State ex rel. Weasmer v. Manpower of Omaha, Inc., *supra,* became res judicata, the present effect of which is to say that no adjudication may be had on those matters and issues in the present case. On the other hand if the matters and issues here are not the same as those in that case the doctrine of res judicata has no application and the motion for dismissal was accordingly improperly sustained.

One rule for the determination of whether or not a judgment shall operate as res judicata is the following: "A judgment will not operate as res judicata unless it

appears on the face of the record, or is shown by extrinsic evidence, that the precise question was raised and determined in the former suit." O'Connor v. Abbott, 134 Neb. 471, 279 N. W. 207.

Another rule is the following: "Whether a former judgment is a bar to an action ordinarily depends on whether the same evidence will sustain both the present and the former action, and when it appears that different proof is required, a judgment in one of them is no bar to the other." Boomer v. Olsen, 143 Neb. 579, 10 N. W. 2d 507. See, also, Gayer v. Parker & Son, 24 Neb. 643, 39 N. W. 845, 8 Am. S. R. 227.

In this case it does not appear on the face of the record, and it has not been shown by extrinsic evidence, that the precise question or questions presented here were raised and determined in the former suit. Also it does not appear that the same evidence would sustain the two actions.

It is clearly evident from the two petitions that in at least one respect the evidence would of necessity have to be different. The first action was based upon a declaration of illegal action of appellee on and prior to July 2, 1954, whereas the present action is based upon a declaration of illegal action of appellees on and prior to January 3, 1956. On the face of the charge in the latter action it could reasonably be said that reference was to action on and prior to July 2, 1954, but on the record made by the evidence it was pointed out that the reference was to the time after July 2, 1954. It is but the statement of a truism to say that proof of acts taking place on or before July 2, 1954, would not be the same as proof of acts taking place after that date.

The fact that the evidence at the trial in the former case may have been of the same kind or character but related to a different time than that involved in the present case could not cause the judgment in that case to become res judicata here. Conceivably in a proper case and under proper circumstances it could call for

application of the doctrine of stare decisis but not the doctrine of res judicata.

It should be pointed out here, if it is not already apparent, that the finality of the judgment on which the appellees rely resides in the opinion of this court in State ex rel. Weasmer v. Manpower of Omaha, Inc., *supra.* In that opinion by specific declaration it was pointed out that the petition stated a cause of action which if proved would entitle the relator to the relief prayed. The question of fact from the standpoint of evidence adduced at the trial was not and could not be reviewed because of the fact that no proper bill of exceptions had been presented to this court. In consequence of this the sole question upon which the determination depended was that of whether or not the pleadings supported the judgment. This was on the well-established rule previously quoted herein from the opinion in Dryden & Jensen v. Mach, *supra,* as follows: "Where the record contains no bill of exceptions or the bill of exceptions has been quashed, no question will be considered, the determination of which necessarily involves an examination of the evidence adduced in the trial court, and in such a situation, if the pleadings are sufficient to support the judgment, it will be affirmed."

The effect of that judgment, in the light of the answer in that case, was to say only that the respondent was entitled to a judgment based upon a conclusive presumption that the findings of the trial court were supported by the evidence. See Adkisson v. Gamble, *supra.* The presumptive finding was, as is clear, that the evidence failed to support the cause of action pleaded which related to the period prior to and including July 2, 1954.

This could not be regarded as a bar to the right to a trial upon a pleaded cause of action arising after July 2, 1954.

The trial court therefore erred in sustaining appellees' motion and in dismissing appellant's action. Accordingly the judgment is reversed and the cause remanded

for a new trial on the issues presented by the pleadings.

REVERSED AND REMANDED.

CARTER and BOSLAUGH, JJ., concurring in the result.

We concur in the result in the foregoing case. We do not agree with certain statements appearing in the opinion of the majority.

The record shows that in a previous appeal to this court the judgment of the district court holding against the relator was affirmed. State ex rel. Weasmer v. Manpower of Omaha, Inc., 161 Neb. 387, 73 N. W. 2d 692. In that opinion it was adjudicated that under the facts pleaded the relator was not entitled to an injunction. A new action was commenced alleging that on occasions subsequent to the final determination of the former case the respondent has violated sections 48-501 and 48-502, R. R. S. 1943. The respondent alleged, in addition to a general denial, that the present case is predicated on the same facts as the earlier case and that the judgment in the former case is res judicata of the issues here presented. At the close of relator's case the trial court sustained a motion to dismiss relator's petition for the reason that the previous case completely adjudicated the issues raised in the second case. This was error, as the majority holds, for the reason that the issue of res judicata must be established by evidence. The respondent having introduced no evidence to establish res judicata, there was no basis for the court's order dismissing relator's petition. Assuming that respondent could establish res judicata by evidence, the ruling of the court was premature. On this basis we concur in the result. We submit that this is the point where the opinion should be concluded.

We disagree with that part of the opinion holding that a judicial determination of acts committed prior to July 2, 1954, may not be res judicata of identical acts committed after January 3, 1956. Our reasons for so doing are two. First, it is not an issue presently before the court and is, therefore, obiter dictum. Second, it

is not a correct statement of the law. The first reason has been adequately explained and we shall devote no further space to it. With reference to the second reason, we adopt the following as a concise statement of our views: "Speaking broadly, the rule of res judicata means that when a court of competent jurisdiction has determined, on its merits, a litigated cause, the judgment entered, until reversed, is, forever and under all circumstances, final and conclusive as between the parties to the suit and their privies, in respect to every fact which might properly be considered in reaching a judicial determination of the controversy, and in respect to all points of the law there adjudged, as those points relate directly to the cause of action in litigation and affect the fund or other subject matter then before the court. And under some circumstances, a judgment will, in certain respects, so establish the legal status of an object or person directly involved in a suit as to bind all parties who may subsequently deal with it or him, even though those thus dealing may have had no connection with the litigation in which the judgment was entered. Issues of fact actually determined in a prior suit, and also those which were relevant subjects for determination therein, cannot be re-examined in a subsequent legal proceeding, between the same parties or their privies, involving the identical cause of action formerly tried. Even where the cause of action in a pending suit is not identical with that previously litigated between the parties, all relevant issues of fact that were actually raised in the prior litigation are res judicata between the parties and their privies,- though, under such circumstances (that is, where the second suit turns on a different cause of action) issues which might have been, but were not, raised and determined in the prior suit, are not accounted in law as res judicata. Finally, the rule of res judicata holds good not only in the court which rendered the judgment in question, but in other tribunals where the same facts or points of law may

later be directly at issue." Moschzisker on Stare Decisis, Res Judicata and Other Selected Essays, p. 32.

It is our position, under the general rules governing the doctrine of res judicata, that the pleading and proof of similar factual situations though occurring at subsequent times do not preclude the defense of res judicata. The doctrine of res judicata affects principally issues of fact. If an issue of fact has been finally determined, the doctrine of res judicata applies to it. Identity of parties or their privies and identity of causes of action are sufficient to invoke the doctrine. It has been said that for the purposes of res judicata there is identity of causes of action when in both the old and new proceedings the subject matter and the ultimate issues are the same.

It is fundamental that facts litigated in civil actions are not res judicata in subsequent criminal proceedings, and vice versa. Hahn v. Bealor, 132 Pa. 242, 19 A. 74; Stone v. United States, 167 U. S. 178, 17 S. Ct. 778, 42 L. Ed. 127. The reason for this is obvious. Usually the parties are not the same and what is more important still as between criminal and civil cases, different standards of evidence and proof are involved. This is a complete answer to the assertion that statutory violations cannot be tolerated and permitted by invoking the doctrine of res judicata in civil actions. We submit further that the doctrine of stare decisis can have no application in a case such as we have here. In any event, it is not a doctrine binding upon the courts. It is used to expedite the work of courts by preventing the constant reconsideration of settled questions. It has no application where, as here asserted in the opinion of the majority, there has been no final adjudication in the former case.

We therefore submit that the question as to whether or not the doctrine of res judicata is a defense in the present case is not before the court and that the discussion of that subject by the majority opinion is obiter

dictum. We submit also that the discussion of the subjects of res judicata and stare decisis as they relate to the present case find no support under the general rules of law applicable to such subjects. We submit further that the holdings of this court support the view we have herein expressed. If there be applicable exceptions to such rules, they should be cited. Incorrect statements of law in an opinion, although they may be properly classified as dicta, can only tend to mislead in the subsequent trial of the case.

ARTHUR STORM, APPELLANT, V. BEN MALCHOW ET AL., APPELLEES.

80 N. W. 2d 477

Filed January 18, 1957. No. 34047.

Abatement and Revival: Courts. A cause of action for personal injuries alleged to have been proximately caused by negligence of a decedent during his lifetime survives, and, when no action was brought thereon during his lifetime, it must be prosecuted by a claim filed against the estate of decedent in the county court which has exclusive original jurisdiction thereof.

APPEAL from the district court for Saunders County: STANLEY BARTOS, JUDGE. *Affirmed.*

Harlan A. Bryant, for appellant.

Robinson, Hruska, Crawford, Garvey & Nye, for appellee Cluck.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CARTER, J.

Plaintiff brought this action in the district court for Saunders County against the defendant Ben Malchow and the defendant R. LaVonne Cluck as the administratrix of the estate of Millard F. Cluck, Jr., deceased, for damages arising out of an automobile accident which

occurred in Saunders County. The defendant administratrix demurred to the petition on the ground, among others, that the court had no jurisdiction of the subject of the action. The trial court sustained the demurrer as to the defendant administratrix and dismissed the action as to her. The plaintiff appeals.

The accident involved an automobile belonging to the plaintiff, which was being driven by his wife, Rose V. Storm, a farm tractor being operated by the defendant Malchow, and an automobile being driven by the deceased Cluck. The petition alleged negligence on the part of Malchow and the deceased, Cluck, resulting in personal and property damage to the plaintiff. The petition further alleges that R. LaVonne Cluck was at the time the action was commenced the duly appointed, qualified, and acting administratrix of the estate of the deceased Cluck, by virtue of an order of the county court of Scotts Bluff County, Nebraska. The only question raised by the appeal is the correctness of the trial court's order in sustaining the demurrer of the administratrix and dismissing the action as to her.

It is not questioned that an action for negligence may be prosecuted against the estate of a decedent for damages resulting from decedent's negligence in his lifetime. In re Estate of Grainger, 121 Neb. 338, 237 N. W. 153, 78 A. L. R. 597. The question here raised is whether an action against the estate of a deceased may be brought originally in the district court or, as contended by the administratrix, must the action against the estate originate as a claim against the estate duly filed in the county court having jurisdiction of the probate of the estate? In this connection we point out that the petition alleges the appointment of the administratrix of the estate of Millard F. Cluck, Jr., deceased, in the county court of Scotts Bluff County before this action was commenced.

The rule is stated in Rehn v. Bingaman, 151 Neb. 196, 36 N. W. 2d 856. We there held: A cause of action for

personal injuries alleged to have been proximately caused by negligence of a decedent during his lifetime survives, and when no action was brought thereon during his lifetime, it must be prosecuted by a claim filed against the estate of decedent in the county court which has exclusive original jurisdiction thereof. Constitutional provisions and legislative acts giving rise to the foregoing conclusion are discussed and analyzed in the Bingaman case. We shall not reiterate them here. The reasoning of that case is correct and we adhere to it. It has been consistently followed as is evidenced by the following cases dealing with the subject: Flessner v. Wenquist, 156 Neb. 378, 56 N. W. 2d 294; Mueller v. Shacklett, 156 Neb. 881, 58 N. W. 2d 344; DeWitt v. Sampson, 158 Neb. 653, 64 N. W. 2d 352.

We conclude, under the rule announced in the foregoing decisions, that plaintiff's cause of action for any damages he sustained must be prosecuted by the filing of a claim in the county court of Scotts Bluff County. The remedy is original and exclusive in such cases and the district court for Saunders County therefore had no jurisdiction of the subject of the action. The trial court was right in sustaining the demurrer of the administratrix and dismissing the action as to her.

AFFIRMED.

ROSE V. STORM, APPELLANT, V. BEN MALCHOW ET AL., APPELLEES.

80 N. W. 2d 479

Filed January 18, 1957. No. 34048.

(NO SYLLABUS)

APPEAL from the district court for Saunders County: STANLEY BARTOS, JUDGE. *Affirmed.*

Harlan A. Bryant, for appellant.

Robinson, Hruska, Crawford, Garvey & Nye, for appellee Cluck.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CARTER, J.

Plaintiff brought this action in the district court for Saunders County against the defendant Ben Malchow and the defendant R. LaVonne Cluck as the administratrix of the estate of Millard F. Cluck, Jr., deceased, for damages for personal injuries arising out of an automobile accident which occurred in Saunders County. The defendant administratrix demurred to the petition on the ground, among others, that the court had no jurisdiction of the subject of the action. The trial court sustained the demurrer as to the defendant administratrix and dismissed the action as to her. The plaintiff appeals.

The facts in the present case are identical with those alleged in Arthur Storm v. Malchow, *ante* p. 541, 80 N. W. 2d 477, released herewith. The legal question raised by the demurrer of the administratrix is the same as that raised and decided in that case. The conclusion to be reached in this case is necessarily the same. For the reasons stated in Storm v. Malchow, *supra,* the judgment of the district court is affirmed.

AFFIRMED.

SHAFEEK FARAG, APPELLANT, V. PAULINE B. WELDON, APPELLEE.

80 N. W. 2d 568

Filed January 25, 1957. No. 34022.

1. **Trial.** In determining the sufficiency of evidence to sustain a verdict, the evidence must be considered most favorably to the successful party, any controverted fact must be resolved in his favor, and he must have the benefit of the inferences reasonably deducible from the evidence.
2. ———. To justify the direction of a verdict, it is not necessary

that there should be literally no evidence to go to the jury; it is sufficient if there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established.

3. **Automobiles: Negligence.** When one, being in a place of safety, sees and is aware of the approach of a moving vehicle in close proximity to him, suddenly moves from the place of safety into the path of such vehicle and is struck, his own conduct constitutes contributory negligence more than slight in degree, as a matter of law, and precludes recovery.
4. **Trial.** Where the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question, as a matter of law, rather than submit it to a jury for determination.

APPEAL from the district court for Lancaster County: HARRY R. ANKENY, JUDGE. *Affirmed.*

Ralph W. Slocum, Thomas J. Gorham, and *Mark A. Buchholz,* for appellant.

Davis, Healey, Davies & Wilson, Robert A. Barlow, and *Kenneth Cobb,* for appellee.

Heard before SIMMONS, C. J., MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

MESSMORE, J.

This is an action at law brought by Shafeek Farag in the district court for Lancaster County, as plaintiff, against Pauline B. Weldon, defendant, to recover damages for personal injuries sustained by him when he was in the act of crossing a street and was struck by an automobile owned and being driven by the defendant. Trial was had to a jury. At the conclusion of the plaintiff's case the defendant moved for a directed verdict, which was overruled. The defendant then introduced her evidence, and at the close of all of the evidence the defendant moved for a directed verdict or, in the alternative, for a dismissal of plaintiff's case. This motion was sustained and the plaintiff's case was dismissed. Plaintiff appealed.

The plaintiff's petition charged the defendant with negligence which he alleges constituted the proximate cause of the injuries sustained by him, as follows: (a)

Failure to keep a proper lookout; (b) failure to yield to the plaintiff the right-of-way to which he was entitled; (c) failure to sound her horn or to give some warning signal to plaintiff; (d) failure to observe the plaintiff in time to stop or otherwise avoid hitting him; (e) failure to bring her vehicle to a stop in order to avoid a collision with plaintiff; and (f) failure to alter or divert the course of her vehicle in order to avoid a collision with the plaintiff.

The defendant, in her answer, denied negligence on her part; alleged that any injuries sustained by the plaintiff as a result of the accident were caused by negligence on the part of the plaintiff which was more than slight; and charged the plaintiff with negligence as follows: (a) He failed to maintain a proper lookout; (b) he failed to yield the right-of-way to defendant's automobile; (c) he failed to stop before running into defendant's automobile; (d) he saw, or by the exercise of ordinary care could have seen the defendant's automobile in time to have slackened his pace and avoided colliding with defendant's automobile, but failed to do so; (e) he failed to see defendant's automobile, or, if he did see it, he proceeded into the street in disregard of the knowledge thus acquired; and (f) he ran into the street and against the left front side of the defendant's automobile at a rate or pace which was unreasonable and improper.

The plaintiff's reply was a general denial of the defendant's allegations of negligence contained in her answer.

Q Street in Lincoln, Nebraska, is approximately 60 feet wide. Eleventh Street, at the intersection of Q and Eleventh Streets, is approximately 50 feet wide at the north end of the intersection and approximately 70 feet wide at the south end of the intersection. Q Street consists of brick paving and four traffic lanes, two for eastbound traffic and two for westbound traffic, which were marked at the time of the accident. On the north

side of Q Street west of the intersection is Dick's parking lot. The second traffic lane from the north curb of Q Street for westbound traffic is 9 feet wide.

The record shows that during the evening of August 11, 1954, the plaintiff and his family started in his car to go to the Labor Temple. They parked the car north of Q Street and on the west side of Eleventh Street. The plaintiff got out of the car and proceeded to the Labor Temple which is located in the middle of the block on the west side of Eleventh Street south of the intersection of Q and Eleventh Streets. The sky was overcast, and it was raining. The plaintiff remained in the Labor Temple 10 or 15 minutes and left to go back to his car. He testified that he was on the curb preparing to cross the street in the pedestrian lane when he saw a car approaching from the east in the second lane for westbound traffic, which would be the first lane north of the center of the street. This was the defendant's car. It was half a block to the right of plaintiff, or to the east. He started across the street, and when he was in the first lane north of the center of the street he saw the same car somewhere around the beginning of the intersection. He thought he would not be able to make it across the street walking, so he started to run, but did not run fast enough for the speed of the car, and it struck him. He saw the defendant's car coming toward him. He heard no sound of a horn, nor did he see the flicking of car lights or an attempt by the defendant to swerve the car. He had taken a few "speedy" steps to the north in an endeavor to avoid the accident. He was in no position to see or know what part of the defendant's car struck him. He was wearing a white shirt with an open collar, greenish-gray trousers, and black shoes. He was also wearing his glasses. After being struck by the defendant's car, he was lying on the ground on Q Street. People were gathering around. He had the keys to his car in his hand and gave them to a gentleman and asked him if he would be kind enough to take

his family home. He was taken in an ambulance to a hospital where he received medical attention.

On cross-examination the plaintiff testified that he approached the intersection to cross the street about 8 p.m. There was nothing to interfere with his vision. The light was "fairly good." When he first saw the defendant's car he was on the sidewalk a couple of steps south of the curb. There was no other traffic on the street except a vehicle following the defendant's car. He stepped out into the street and proceeded across the intersection, watching the defendant's car all of the time. When he reached a point approximately in the middle of the inside lane for westbound traffic, the defendant's car was just to the east of the intersection and in the inside lane for westbound traffic. At this point the plaintiff took a few "speedy" steps to the north. He could not estimate how many. As the plaintiff crossed to the center of the street, he watched the defendant's car. He did not stop at the center of the street because he presumed he had the right-of-way. The plaintiff further testified that by "a few speedy steps" he did not mean that he was running, and that he did not run from the time he left the Labor Temple up to the time of the impact. In a deposition taken before trial the plaintiff said he watched the defendant's car right up to the time of impact. He also said: "I wouldn't have run if I hadn't watched" and "* * * I was trying to get out of the rain as soon as possible, and in this case the rain can speed the pace."

A witness for the defendant testified that about 8 p.m., the night of the accident, he was driving east on Q Street in the traffic lane nearest the south for eastbound traffic. He stopped his car with its front wheels about 3 feet from the west side of the cross walk on Eleventh and Q Streets preparatory to making a right turn onto Eleventh Street. He saw a man dressed in a white shirt and dark trousers, which later proved to be the plaintiff, who looked at his car and ran in front of

it with his head down as if "bucking the rain." He was running at an angle. There is a parking lot on the northwest corner of Eleventh and Q Streets and a driveway into the parking lot approximately 50 feet west of the northwest corner of the intersection of Eleventh and Q Streets. The plaintiff was running toward this parking lot. This witness proceeded to make the turn, and as he proceeded a few feet, he heard a thud. He parked his car and ran to the scene of the accident. He saw the plaintiff north of the center line of the street and 3 or 4 feet west of the driveway to the parking lot. He was lying with his head to the north and looked as if he was doubled up, with his feet pulled up. The back of the defendant's car was almost even with the plaintiff's body.

On cross-examination this witness testified that he saw cars coming from the east. The first time he looked they were about half a block distant from him. The plaintiff at that time was standing on the curb. He did not see the plaintiff after he passed in front of his car.

A witness who had been driving a truck about 50 feet behind the defendant's car from Thirteenth and Q Streets testified that he was traveling from 20 to 25 miles an hour and was in the north lane for westbound traffic. The defendant was in the inside lane for westbound traffic. The lights on the truck were on and the windshield wipers were working. There was a light rain falling at that time. The defendant's car had its taillights burning. He saw the plaintiff running diagonally from the south side of the street to the north side of the street. The plaintiff was a little north of the center line of the street and 5 or 6 feet southwest of the driveway to Dick's parking lot. The left front fender of the defendant's car struck the plaintiff. At that time he saw the brake lights come on. The defendant's car was in its own lane of traffic. The defendant stopped her car in about half a car length. The plaintiff was lying about that distance behind the defendant's car. The

defendant's car did not drag the plaintiff any distance. This witness stopped his truck and went to the scene of the accident, being one of the first to arrive. The plaintiff was lying on the ground half a car length back of the defendant's car, on the south side thereof. The plaintiff handed the keys to his car to this witness who later gave them to the plaintiff's wife. Thereafter, the ambulance came and took the plaintiff away.

On cross-examination this witness testified that he was halfway across the intersection when he first saw the plaintiff who was almost across the intersection. He could see over the defendant's car because the seat of the cab of his truck was about 2½ feet higher than an ordinary passenger car. He saw the accident when it happened. The plaintiff was running across the intersection with his head down. It seemed as though he ran right into the side of the left front fender of the defendant's car. It was raining at the time.

A police officer charged with the duty of investigating traffic accidents and making reports on them testified that he came to the scene of the accident shortly after it happened; that the sky was overcast; that it was very dark and raining; and that the street lighting on Q Street was very poor. He observed two cars near the scene of the accident, one car to the northwest of the plaintiff and the other to the rear of that car. He talked to the plaintiff and obtained his name. Shortly after that the plaintiff was put into an ambulance. The officer made a check of the area from the east side of the west cross walk to the point where the car driven by the defendant had stopped. He found some broken glass and mud lying on the street. The glass was from the headlight lens of the defendant's car. The glass and accumulation of mud was 3 feet north of the center line of Q Street and 68 feet west of the west curb of Eleventh Street on the south side of Q Street. This, as he later testified, was the point of the impact. He examined the defendant's car. The left headlight was broken out

and there was a small indentation to the left of the left front headlight on the rounding portion of the left fender, just back of the chrome strip around the headlight. This indentation was not present prior to the time of the accident, as testified to by the defendant's husband who examined her car a day or two prior thereto. The plaintiff was lying with his head in a northwesterly direction, his feet in a southeasterly direction, and he was at a slight angle very near the center of the street, a few feet west of the accumulation of glass and mud and south of the defendant's car. The defendant's car had traveled a distance of 12 feet from the point of the accumulation of glass and mud. The windshield wipers on the defendant's car were operating and the right headlight was burning. The brakes were in good mechanical condition. The officer finished his investigation between 8:40 and 8:45 p.m. He then left the scene of the accident and went to St. Elizabeth Hospital where the plaintiff had been taken in the ambulance. At the hospital he had a conversation with the plaintiff just before some X-rays were to be taken, and asked him for the details of the accident. The plaintiff told the officer that he had been at the Labor Temple and he was proceeding back to his car which was parked in Dick's parking lot; that he had entered Q Street coming from behind two parked vehicles and ran across the street with his head down due to the fact that it was raining; and that he did not see any vehicle before the accident. Thirty or 40 minutes later, after the X-rays were taken and developed they were shown to this witness. The doctor and this witness went to the plaintiff's room. The plaintiff's wife was there and a nurse, or nurse's aide. The plaintiff was in bed, and the officer again asked him to give him the story of the accident. The plaintiff repeated the story in substance as heretofore set out.

On cross-examination the officer testified that there were no skid marks. He talked to the defendant about 8:25 p.m., when she was in the immediate vicinity of

the accident. She made a statement that she did not see the plaintiff until her car struck him.

The defendant testified that she traveled about 20 to 25 miles an hour, and as she approached the intersection of Eleventh and Q Streets she slowed down and looked through the space cleared by the windshield wipers which were operating as it was raining. She observed no one on the cross walk or on the west side of Eleventh Street, and there were no cars to interfere with her driving the direction she was going. She stepped on the gas to move forward, as she had taken her foot off the gas pedal while approaching the intersection. As she proceeded into the intersection, there was a car approaching slowly from the west in the outside lane for eastbound traffic on Q Street. As she started across the intersection this motorist was somewhere beyond the mid point of the block between Tenth and Eleventh Streets. As she proceeded into the intersection, shortly after crossing the cross walk area, a "silhouette" appeared before her in the form of a man with his right arm extended in a position such as if he was about to go over a hurdle. By "silhouette" she meant that there was no light from her direction on the figure she saw. The lighted area on Tenth Street made the form appear black to her. This "silhouette" appeared directly over the headlight on the left front fender of her car. There was an impact. She saw the "silhouette" practically at the time of the impact. After the impact the plaintiff's body rolled off to the left of her car, with his head and shoulders toward her. She stopped her car and went back to where the plaintiff was lying, approximately half a car length back of her car, to the left or south thereof. He was flat on his back with his hands up. She looked to the north and saw a man, and called to him to get an ambulance and to call the police. The plaintiff's head was to the north and his feet to the south. She bent over him to protect his face from the rain. He immediately rolled on his left side and pulled his knees

up. She asked him his name and he told her.

On cross-examination she testified that she told the police officer that she did not see the plaintiff until his "silhouette" was in front of her. She further testified that she did not sound the horn before the impact; that she did not turn her car or divert its direction prior to the impact; that she made no attempt to stop her car before the impact; and that she saw the plaintiff an instant before the impact and not before that time.

The plaintiff's assignments of error may be summarized as follows: The trial court erred in dismissing the plaintiff's cause of action on the grounds that it was not sustained by the evidence. The judgment of the trial court dismissing the plaintiff's cause of action is contrary to law.

In considering the above assignments of error, and from a review of the record, we deem the following to be applicable to the instant case.

It is well established in this jurisdiction that upon a motion for a directed verdict at the conclusion of all of the evidence, the motion must be treated as an admission of the truth of all of the material and relevant evidence admitted and all proper inferences to be drawn therefrom.

To justify the direction of a verdict, it is not necessary that there should be literally no evidence to go to the jury; it is sufficient if there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established. See, In re Estate of Frazier, 131 Neb. 61, 267 N. W. 181; In re Estate of Benson, 153 Neb. 824, 46 N. W. 2d 176.

In Belville v. Bondesson, 130 Neb. 926, 266 N. W. 901, a case involving a pedestrian crossing a street and being struck by an automobile, this court said: "In examining the question of plaintiff's contributory negligence, it is necessary for us to formulate some idea as to what an ordinarily cautious and prudent man would do under like circumstances. We think he would act

about as follows: On reaching the intersection, he would look both to his right and to his left. Seeing that no cars were coming from the right that would endanger him before reaching the center of the street and determining that he could safely cross in front of cars coming from his left, he would proceed, being watchful of the cars whose traffic lanes he was crossing. Arriving in the center of the street, he would devote the greater part of his attention to cars coming from the south (in the instant case, cars coming from the east) whose traffic lanes he would cross in reaching the other side of the street, being alert, however, at all times, to the possibility that a car might appear where normally it would not be expected." See, also, Ring v. Duey, 162 Neb. 423, 76 N. W. 2d 433; Corbitt v. Omaha Transit Co., 162 Neb. 598, 77 N. W. 2d 144; Cuevas v. Yellow Cab & Baggage Co., 141 Neb. 662, 4 N. W. 2d 790.

In Corbitt v. Omaha Transit Co., *supra,* this court stated the following rule: "When one, being in a place of safety, sees and is aware of the approach of a moving vehicle in close proximity to him, suddenly moves from the place of safety into the path of such vehicle and is struck, his own conduct constitutes contributory negligence more than slight in degree, as a matter of law, and precludes recovery." See, also, Cuevas v. Yellow Cab & Baggage Co., *supra;* Ring v. Duey, *supra.*

The plaintiff, by his own testimony, saw the defendant's automobile approaching the intersection in its proper lane for westbound traffic when it was half a block to the east of him and before he stepped off of the south curb of Q Street to cross the intersection. He entered the street and continued to observe the defendant's automobile until he collided with it. He was in a position of safety while on the curb before he entered the street and while crossing the two lanes for eastbound traffic. At the center of the street he did not stop, but proceeded on, took a "few speedy steps" to the north, and collided with the defendant's automobile. The plaintiff could

have stopped or have stepped back when he reached the center of the street to protect his own safety, and when he was asked if he stopped at the center of the street he answered that he did not, and gave no reason for not doing so. He said: "I was continuing walking, presumably having the right of way."

Where the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question, as a matter of law, rather than submit it to a jury for determination. See, McIntosh v. Union P. R. R. Co., 146 Neb. 844, 22 N. W. 2d 179; Corbitt v. Omaha Transit Co., *supra.*

The evidence in the case at bar clearly shows that plaintiff was guilty of more than slight negligence which defeats the recovery, in which case it is proper to sustain a motion for directed verdict for the defendant. McDonald v. Omaha & C. B. St. Ry. Co., 128 Neb. 17, 257 N. W. 489.

The plaintiff contends that he had the right-of-way and it was the defendant's duty to yield the right-of-way to him while he was crossing the intersection.

Section 39-751, R. R. S. 1943, provides in part: "The driver of any vehicle upon a highway within a business or residence district shall yield the right of way to a pedestrian crossing such highway within any clearly marked crosswalk or any regular pedestrian crossing included in the prolongation of the lateral boundary line of the adjacent sidewalk at the end of a block, except at intersections where the movement of traffic is being regulated by traffic officers or traffic direction devices. Every pedestrian crossing a highway within a business or residence district at any point other than a pedestrian crossing, crosswalk or intersection shall yield the right of way to vehicles upon the highway."

This statute does not relieve the plaintiff of responsibility for the result of his own contributory negligence. See Corbitt v. Omaha Transit Co., *supra.*

There is no evidence that the defendant was not driving her car in the proper manner and at a proper rate of speed. There is no evidence from which a reasonable inference would flow that the defendant had an opportunity, in the exercise of ordinary care, to avoid the accident. The evidence of the defendant, coupled with the evidence of the plaintiff, discloses that the plaintiff saw the approach of the defendant's automobile and stepped into its path under circumstances which did not allow the defendant time and opportunity, in the exercise of ordinary care, to avoid the accident. The evidence discloses the lack of due or ordinary care on the part of the plaintiff in crossing the intersection.

The conclusion reached is that the district court committed no error in dismissing the action of the plaintiff. The judgment is affirmed.

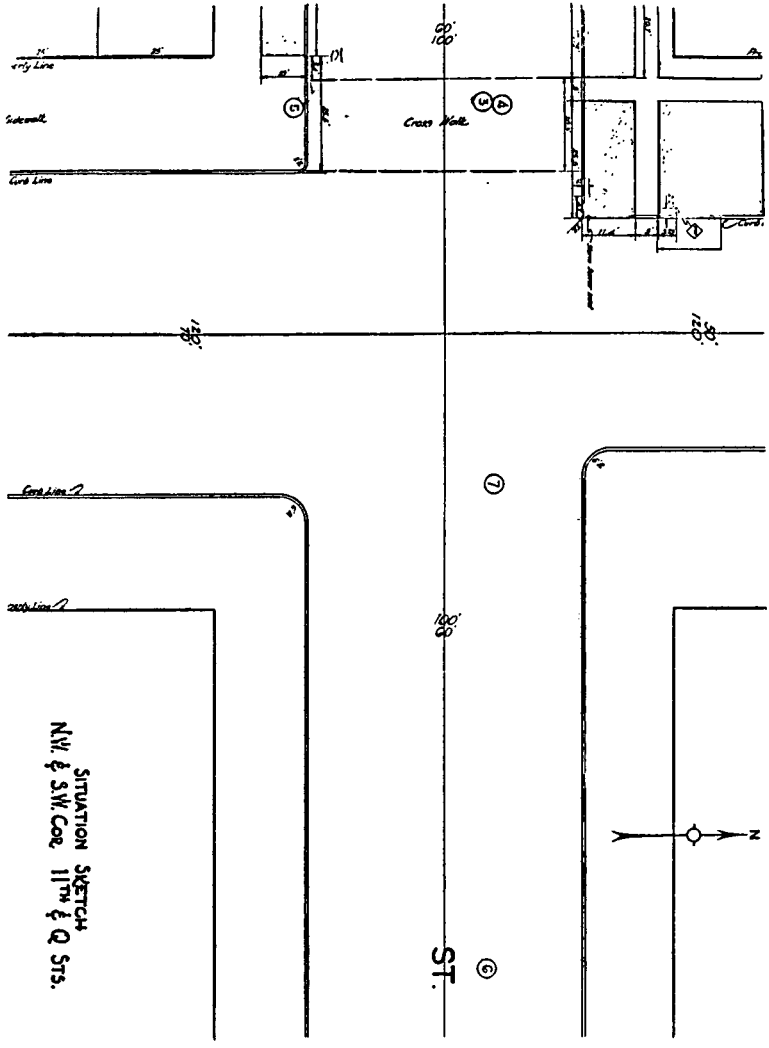
AFFIRMED.

WENKE, J., dissenting.

I dissent from the opinion of the majority which primarily holds that the record discloses that appellant was, as a matter of law, guilty of contributory negligence sufficient to defeat any right of recovery he might otherwise have. To me, based on the principle hereinafter set forth, the record as to that issue presents a question of fact for a jury. The principle I refer to is: Where a pedestrian approaches a street at a crosswalk and looks and sees an approaching vehicle on the street he is about to cross but erroneously judges its speed or distance or for some other reason assumes he can proceed with safety, the question of whether or not his conduct in doing so makes him guilty of contributory negligence is usually one for the jury.

In order to present what I consider evidence of a factual question in this regard I shall set forth certain questions asked appellant and his answers thereto. To make these questions and answers clear it will be necessary to set forth a plat of the intersection (exhibit 1 in the record) where the accident happened and certain

numbers placed thereon by appellant. It follows:



It should be remembered the evidence hereafter quoted is, for the purpose of this appeal, subject to the following principle stated in the majority opinion: "* * * upon a

motion for a directed verdict at the conclusion of all of the evidence, the motion must be treated as an admission of the truth of all of the material and relevant evidence admitted and all proper inferences to be drawn therefrom."

In setting forth the testimony it is not necessarily quoted in the order as found in the bill of exceptions but as it relates to the sequence of events as appellant approached and attempted to cross the intersection on the crosswalk. In this respect appellant, Shafeek Farag, testified as follows:

"Q- Now, Mr. Farag, as you came out of the Labor Temple and went up toward the intersection to the north, were you traveling at a rapid pace?
A- What do you mean 'rapid pace'?
Q- Well, —
A- Ordinary walking pace.
Q- Was it raining at that time?
A- It was raining.
Q- From the curb up to the center of this street you were just normally walking?
A- Normal walking.
Q- Now at any time from the time you left the Labor Temple until you reached the point of impact, did you run?
A- No.
Q- You have indicated * * * you were going out in the street crossing Q going north at the crosswalk?
A- Yes, sir.
Q- On the west side of 11th Street?
A- Yes, sir.
Q- Now when did you first see a car, if you remember?
A- I saw it when I was standing on this curb here (indicating).
Q- Will you please make a number '5' and put a

circle around it, the number indicating the point on Exhibit 1 where you were when you first saw Mrs. Weldon's car? (Witness complies.)

Q- * * * Where was Mrs. Weldon's car when you were at point '5'?

A- Somewhere along this street here (indicating).

Q- Well, could you estimate it in car lengths or some other unit?

A- No. I would say it was somewhere in the middle of that block (indicating). That is an approximation.

Q- Would it be fair to say approximately a half block?

A- Approximately.

Q- Now would you with that pencil put a number '6' on Exhibit 1 to show approximately where Mrs. Weldon's car was when you first saw it?

A- Supposing this is a block (indicating), call this a block. I don't know how far is a block, but supposing this is a block (indicating), then if the middle of the block would be here (indicating)—of course there are two lanes here (indicating)—then her car was in the middle of the block and it would be '6' here—middle of the block.

Q- Now tell what happened?

A- Then I started crossing the street—

Q- Well, had you stepped into the street before you saw her?

A- No.

Q- You were still up on the sidewalk on 11th Street?

A- Yes.

Q- And you had not reached the curb?

A- No.

Q- How far from the curb were you?

A- A couple of steps.

Q- And at that point when you were a couple of steps south of the curb, you saw Mrs. Weldon's car to your right approximately half a block away?
A- Yes.
Q- Now what other traffic, if any, did you observe on Q Street?
A- There was no other traffic in the street except a car coming after her.
Q- Now was there any traffic on the street west of the intersection and toward your left, as you went up to the sidewalk?
A- No, there was none.
Q- Now, Mr. Farag, I take it that your testimony is that you stepped out into the street—off the curb and onto the street, is that correct?
A- Correct.
Q- And did you watch the Weldon car?
A- I was all the time.
Q- And your testimony is that you proceeded north across the street?
A- Yes.
Q- And did you continuously watch the Weldon car up to the time of the impact?
A- Yes.
Q- You started crossing the street?
A- * * * when I was in the second—in this lane here (indicating)— Is that the inside lane?
Q- Yes.
A- The first after the middle line.
Q- Would you make an approximate circle and number it '3'? (Witness complies.)
Q- I believe your testimony is that '3', with a circle around it, represents where you were when Mrs. Weldon's car was at the beginning of the intersection. Is that correct?
A- Correct.

Q- Now you didn't stop at all at any time before you reached point '3', did you?
A- No.
Q- Now when you were at point '3' you saw, you observed, the Weldon car at that time?
A- Yes.
Q- And at that time you testified she had not entered the intersection on the other side of the street?
A- No, she was about at point '7,' where the place is marked '7.'
Q- How far over the center line were you?
A- Well, I was— I would say I was about the middle of the lane.
Q- And which lane?
A- Her lane. The lane in which her car was.
Q- That would be the inside lane for westbound traffic on Q Street?
A- Correct.
Q- Then is No. 3 supposed to represent approximately the middle of that lane?
A- Approximately so.
Q- Now what do you mean by 'the beginning of the intersection'?
A- Somewhere here (indicating).
Q- Now would you take—
A- Do you want me to write '7' here?
Q- Would you put a '7' with a circle around it? (Witness complies.)
Q- Is that correct that that '7' is intended to represent the position of Mrs. Weldon's car at the time you were at what you have—
A- In her lane.
Q- (Continuing with the question) indicated as '3' on this Exhibit 1?
A- Correct.
Q- That '7' you have placed on Exhibit 1 to represent the position of Mrs. Weldon's car when

you were at point '3' on Exhibit 1? Would that be the front end of her car?
A- What?
Q- The front end of her car?
A- What do you mean by 'front end of her car'?
Q- Well, the front of her car had proceeded up to point '7'?
A- Yes.
Q- Now, in your own words, tell what happened about that time.
A- Well, about that time I was hit by the other car— the car that was coming from this direction (indicating).
Q- You have later learned that was Mrs. Weldon's car and she was driving?
A- Yes, sir.
Q- Would you indicate with the number '4' approximately, if you know, where the car hit you at the intersection in the street there?
A- What do you mean by that exactly?
Q- Well, did you go further than '3'? You indicated you saw the car there.
A- Well, I would say I was somewhere around— well, here (indicating).
Q- Mark that with a '4'.
A- '4'.
Q- Now, Mr. Farag, is it correct that point '4' which you have placed on Exhibit 1, I believe you testified that that is where Mrs. Weldon's car struck you? Is that correct?
A- Approximately.
Q- You had taken— Is this right, you had taken a few steps further north?
A- Yes, a few steps—a few speedy steps.
Q- To the north?
A- To the north.
Q- When you got in the middle of the street or a little beyond it?

A- Yes.
Q- You have used the term, in describing your going from point '3' to point '4' on Exhibit 1 as a few speedy steps. Is that correct?
A- More than the usual pace that I was walking.
Q- When you used the term 'speedy steps,' would that be the same as running?
A- No.
Q- I think you stated you saw the defendant's car coming right towards you. Is that what you said?
A- Yes, sir.
Q- You took a few, is that the best—
A- I wouldn't be able to estimate how many.
Q- And the circle and number '4', or the circle around number '4', you placed that on there to represent the point of impact?
A- Correct.
Q- And that is a few speedy steps north of the point '3', which is the middle of the lane in which she was traveling?
A- Correct.
Q- She maintained a straight course?
A- She maintained a straight course, but I wouldn't state that she was exactly in the lane. She could have been a little off the lane or on the line, or it could be that way, because the street was wet."

If a jury believes this testimony, which it would have a right to do, it is my opinion appellant would not be guilty of any negligence which contributed to his injury sufficient to defeat any right to recover which he might otherwise have. I realize there is evidence to the contrary, including that of Charles Floyd Pidgeon who was driving a car east on Q Street and observed the manner in which appellant started across Q Street; that of Louis Plisek who was following appellee west on Q Street while driving a truck and who saw appellee's

car hit appellant; that of police officer Arthur A. Walker who talked with appellant that night at the hospital and who testified as to how appellant told him the accident happened; and that of appellee herself, including where the damage to her car occurred. All of this presents a very different picture as to the manner in which and where the appellant crossed the street and where the accident happened. In my judgment the final decision as to who was telling the truth in this respect is one of fact for a jury and not one of law for this court.

The majority opinion also infers the evidence does not disclose a situation from which a jury could find that appellee was guilty of negligence. First, in my judgment, section 39-751, R. R. S. 1943, has no application to the factual situation here presented. However, I think section 701(c) of Ordinance 5699 of the City of Lincoln does. It provides: "*Right of Way. (c) Pedestrians.* The driver of any vehicle upon a street within the city shall yield the right of way to a pedestrian crossing such street within any crosswalk; provided, however, at intersections where traffic is regulated by a traffic officer or an automatic traffic signal, the pedestrian, to be entitled to the right of way, must be proceeding in accordance with the directions of such traffic officer or automatic traffic signal regulating the movement of traffic at such intersection."

It was stipulated no officer was directing traffic at this intersection at the time of accident nor was the intersection controlled by an automatic traffic signal. It was therefore appellee's duty to yield the right-of-way to appellant if a jury believed his testimony as to how and where he was crossing the street and appellee cannot excuse herself by saying, as she did, that she did not see him through the space cleared on her windshield by the wipers until she struck him. She was duty bound to look and see what was in plain sight. Under this situation it is my opinion it was a question for a jury to determine whether or not she maintained a proper look-

out and, if not, whether such failure caused her not to observe appellant until it was too late to avoid hitting him.

BETTY LOU BRESLEY, APPELLEE, V. O'CONNOR INCORPORATED ET AL., APPELLANTS.

80 N. W. 2d 711

Filed January 25, 1957. No. 34034.

1. **Highways.** The rules of the road fixed by section 39-741, R. R. S. 1943, extend to all public highways, however created, and to all roads not public highways if used for travel by the public.
2. ———. Where construction work on a highway has been completed and, although not officially opened to public travel, is being used by the general public, the highway is a public highway, and the statutory rules of the road are applicable thereto.
3. **Automobiles: Negligence.** The duty of a guest riding in an automobile is to use care in keeping a lookout commensurate with that of an ordinarily prudent person under like circumstances.
4. ———: ———. A guest is not required to use the same degree of care as the driver of the automobile. If a guest perceives danger, or should have perceived it under the circumstances shown by the evidence, a duty to warn the driver arises. Ordinarily, however, a guest need not watch the road or advise the driver in the management of the automobile.
5. **Negligence: Trial.** Where there is no evidence to sustain a finding of contributory negligence, the court did not err in failing to submit such issue to the jury.
6. **Appeal and Error.** Harmless error in the admission of evidence is not sufficient ground for the reversal of a judgment.
7. ———. The admission in evidence of the life expectancy tables held to be without error.
8. **Trial.** A verdict may be set aside as excessive only when it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, or mistake, or that it is clear that the jury disregarded the evidence or controlling rules of law.
9. **Automobiles.** The duty of a driver of a motor vehicle to sound a horn or give a warning of its approach is not an absolute one but it depends upon the circumstances.
10. **Appeal and Error.** It is not error to submit the issue of future pain and suffering to the jury when the evidence shows proof of the same with reasonable certainty.

11. **Trial.** Instructions given to a jury must be construed together, and if, when considered as a whole, they properly state the law, it is sufficient.

APPEAL from the district court for Polk County: H. EMERSON KOKJER, JUDGE. *Affirmed.*

John E. Dougherty, for appellants.

Wear, Boland & Mullin and *Robert E. McCormack,* for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

MESSMORE, J.

This is an action at law brought by Betty Lou Bresley, plaintiff, in the district court for Polk County, against O'Connor Incorporated, Ray F. O'Connor, and Derald L. Nelson, defendants, to recover damages for personal injuries sustained by the plaintiff resulting from a collision between the automobile in which she was riding as a guest, being driven by her husband Milo Bresley, and an International tractor and semitrailer being driven by Derald L. Nelson, an employee of O'Connor Incorporated. The trial was had to a jury which returned a verdict in favor of the plaintiff for $17,500. Each of the defendants separately filed a motion for new trial, all of which motions were overruled. From the order overruling the motions for new trial, the defendants appeal.

The accident occurred on November 7, 1954, at about 8:20 p.m., at the intersection of State Highway 92 and U. S. Highway No. 30A with U. S. Highway No. 81, at a point 3 miles west of Osceola in Polk County. State Highway No. 92 and U. S. Highway No. 30A are the same in this area, and will be referred to as Highway No. 30A. U. S. Highway No. 81 will be referred to as Highway No. 81. The automobile in which the plaintiff was riding will be referred to as the Bresley car; the International tractor and semitrailer as above designated as the de-

fendants' truck or unit; Betty Lou Bresley as plaintiff; and the defendants' driver as Nelson.

Highway No. 30A runs east and west and intersects Highway No. 81 from the south. There is a county road from the north that intersects Highways Nos. 30A and 81. There are cement islands dividing east-west traffic lanes on Highway No. 30A. There is a storage area which extends 375 feet east of the junction of Highways Nos. 30A and 81, for westbound vehicles desiring to execute a left turn. The intersection is 49 feet wide from the north edge of Highway No. 30A south to the north point of the cement island dividing Highway No. 81 as it intersects from the south. From the north edge of the storage portion of the island running east of the junction to the northernmost point of the island dividing Highway No. 81 from the south, is 21 feet. The island dividing Highway No. 30A west of the intersection has no refuge area. Highway No. 30A is level and free from curves or obstructions for a considerable distance both east and west of the junction. The intersection is a four-way intersection. There were no stop signs or traffic control signs of any kind facing eastbound traffic on Highway No. 30A at the time of the accident. The weather was good; and the highway was dry and in good traveling condition.

The record discloses that the plaintiff's husband, an officer in the Air Force stationed at Offutt Air Force Base at Omaha, formerly lived at Ord, Nebraska, and had made a trip to Ord to visit his parents, leaving Omaha after work on Friday night before the accident. He was driving a 1951 Mercury automobile and was accompanied by his wife, the plaintiff. They left Ord about 6 p.m., Sunday. The plaintiff sat in the front seat next to her husband. When they left Ord they followed the main-traveled highway to St. Paul where they stopped for a few minutes, then drove south of St. Paul 2 or 3 miles and turned to the east on Highway No. 92. The route of Highway No. 92 brought them to the viaduct north-

east of Central City. Passing over the viaduct, they proceeded east on Highway No. 30A. They observed no obstacles such as barricades or flares blocking the highway. They proceeded east on Highway No. 30A which was newly paved. The new pavement started 2 or 3 miles after they crossed the viaduct and continued down to the point where the accident occurred. The car was in good mechanical condition, and a speed of 45 miles an hour was maintained most of the time. The lights were on. They observed other traffic on the highway as they drove east from the viaduct to the scene of the accident. As the Bresley car proceeded east at 45 miles an hour and was 500 or 600 feet from the intersection, the driver noticed westbound traffic traveling on the north side of the highway. All he could see at that distance was bright lights approaching from the east. He started to slow down, and had his foot off the footfeed with no intention of going through the intersection. He placed his foot on the brake. He dimmed his lights several times, changed from high beam to low beam, in an endeavor to get the oncoming vehicle to dim its lights. No change was noted in the headlights of the oncoming vehicle. When plaintiff's driver arrived 70 or 80 feet from the intersection, he noticed the vehicle approaching from the east starting to cut across the south section of the north part of the highway. The vehicle was turning to the left onto Highway No. 81 to proceed south, and was traveling in a southwesterly direction across the intersection. It started to turn before getting to the center line of the highway and did not slow down from the time it first went into the turn until the time of the impact. He estimated the speed of the vehicle at about 15 miles an hour. The Bresley car, when 70 or 80 feet from the intersection, was traveling close to 35 miles an hour. In going into the intersection with its wheels sliding, it was traveling about 4 miles an hour. It swerved slightly to the right when it arrived at the intersection and was practically standing still at the time

of impact. The left side of the Bresley car and the right front of the truck came together. After the impact, the Bresley car was moved approximately 3 feet sideways to the southwest. The driver of the Bresley car did not sound its horn, neither did the driver of the truck. After the impact, the plaintiff was slumped over in the front seat. She appeared to be unconscious, was bleeding from the head, and was in pain. She recovered so she could talk to her husband, and remained in the car until the ambulance came to take her to the Osceola hospital.

The plaintiff's driver further testified that all of the Bresley car was on Highway No. 81 at the time of the impact; that when the Bresley car was 60, 70, or 80 feet west of the intersection he applied the brakes and tried to stop; and that any vehicle coming west had the possibility of proceeding straight west, turning to the right to proceed north, turning to the left to proceed south, or pulling into the storage lane and stopping until eastbound traffic cleared the intersection.

The defendants' driver testified that defendants' truck was equipped with two lights on each corner, a cluster of three lights and four stop lights on the rear, but there was no mechanical signal on the truck. The over-all length of the truck and trailer was 45 feet. He was hauling a cargo of 18 tons. He left Weston, Nebraska, at about 6:30 p.m., and stopped at Shelby about 15 minutes to check the clearance lights and replace a bulb in the cluster at the back of the trailer. He then left Shelby for Hutchinson, Kansas. He followed Highway No. 30A up to the junction of Highway No. 81 where the accident happened. As he proceeded out of Osceola he passed a truck just over the crest of a hill. His speed at that time was 40 to 42 miles an hour. After passing the truck he pulled back into his lane of traffic and stayed there until he arrived at the storage space. He was traveling 15 to 20 miles an hour at that time. He pulled into the storage space. The lights on his truck

were on low beam as he came close to the intersection, and about half way through the storage space he gave a signal with his left arm to indicate a turn to the left. He continued to retain the signal up to the time he started to make the turn. At the time he gave the signal, he slowed the truck down. Just before he made the turn he shifted into third gear, which is a good pulling gear. When he first saw the Bresley car it was some distance to the west. He could not estimate the distance. His truck was then 10 or 15 feet from the corner of the intersection. He made a turn to the southwest. The tractor was almost across the eastbound lane and its front end could have been a little on Highway No. 81 at the time of the impact. He heard no sound of a horn coming from a westerly direction. He heard brakes squealing. The impact caused the truck to slide to the east a few feet. After the impact, the rear wheels of the truck were still on Highway No. 30A and the tractor part of the unit was on Highway No. 81.

On cross-examination he testified that he swung the front end of the defendants' unit toward the west to enable the trailer to clear the island, proceeding in a southwesterly direction sometime before going into the turn. When he saw the Bresley car just a moment before the impact, he did not turn his wheel to try to avoid the accident, but proceeded straight into the side of the Bresley car at 10 miles an hour.

The plaintiff testified that she saw nothing unusual while proceeding east on Highway No. 30A. Getting close to the point of the accident, she remembered seeing headlights in the distance coming from the east. The radio on the dashboard of the Bresley car was turned on. She was bending over it, trying to dial to a different station. She then noticed a slight change in the speed of the Bresley car. The car seemed to be slowing down a little. She glanced at the road and could see in the distance what appeared to be an intersection. She did not think anything about it. She glanced at the speedo-

meter and noticed the speed was 40 miles an hour. After feeling the car decelerate, she went back to dialing the radio. The next thing she knew her husband slammed on the brakes and yelled. He swerved the car to the right, and as this was happening there were two headlights shining in her face. That was the last she remembered. When she first regained consciousness she was slumped over in the front seat.

A state patrolman investigated the accident, arriving at the scene about 9:30 p.m. Neither the plaintiff nor the driver of the Bresley car was there. The driver of the defendants' truck was there. The vehicles were in the same position they were in at the time of the accident. The left side of the Bresley car was damaged. The right front of the truck was damaged. The eastbound car laid down skid marks from all four wheels for a distance of 64 feet toward the southeast. The patrolman was unable to find any skid marks made by the truck. The defendants' driver gave his speed as 15 to 20 miles an hour. There is an island that divides Highway No. 81 as it comes from the south toward the intersection. The Bresley car was approximately 3 feet west of the island and approximately in line with the south edge of the pavement running east and west, facing in a southeasterly direction with the rear wheels of the car about in line with the south edge of the pavement. The driver of the truck stated that he was going west on Highway No. 30A. He started to pull over to the left-hand side of the highway to make a left turn. He saw a car coming from the west. He thought this car would stop, because he was under the impression that the road to the west was closed. He signaled for a left turn and proceeded to turn to the left. When this witness contacted the driver of the Bresley car, he said he was traveling east; that he saw the headlights of oncoming traffic; and that he slowed down and the truck turned directly in front of him. He saw no turn signals on the truck. The storage area for traffic going west is

for a vehicle attempting to make a left turn to turn into so that vehicles behind will be able to pass in safety, and to give the vehicle making the turn a space of refuge to stop in and wait for oncoming traffic and be out of the main-traveled portion of the highway.

A trucker proceeding west out of Osceola on Highway No. 30A the evening of the accident testified that there is a rise approximately half a mile east of the intersection. While he was driving on the crest of this hill at a speed of 35 miles an hour, a truck going faster than he was, at a speed of approximately 45 miles an hour, passed him and then slowed down. He closed in on this truck and was 400 to 500 feet back of it when it started to make a turn to the left. At that time he saw lights coming from the opposite direction. He believed the car coming from the west was 1,000 to 1,500 feet from the intersection when he first saw it. The truck was approximately 200 feet from the intersection. The truck pulled into the storage space and started to make the turn. The stop lights of the truck were on for some time. He estimated the speed of the truck at 15 to 20 miles an hour when it started to negotiate the turn to the south onto Highway No. 81. He could not see a signal given by the driver of the truck, and was in no position to see the car approaching from the west. Neither did he see the impact. The turn made by the truck driver was a "sharp" turn. He did not hear the defendants' driver sound a horn. The impact occurred in the southwest quarter of the intersection.

The defendants contend that the evidence is insufficient to sustain the verdict, and that the verdict is contrary to law.

In connection with this assignment of error, the defendants assert that the plaintiff and her husband, at the time of the accident, had full knowledge and notice that the highway upon which they were traveling was closed to traffic.

Section 39-741, R. R. S. 1943, provides in part: "(5)

The term 'highway' includes every way or place of whatever nature open to the use of the public, as a matter of right, for the purposes of vehicular travel, but shall not be deemed to include a roadway or driveway upon grounds owned by private persons, colleges, universities or other institutions. (6) The term 'private road or driveway' includes every road or driveway not open to the use of the public for purposes of vehicular travel. (7) The term 'intersection' includes the area embraced within the prolongation of the lateral curb lines or, if none, then the lateral boundary lines of two or more highways which join one another at an angle, whether or not one such highway crosses the other."

The defendants contend that the highway involved in the instant case was not opened officially for travel until the Monday following the accident which occurred on Sunday night, therefore, the road was not a public highway and the rules of the road were not applicable thereto for the reason that the Bresley car would be the same as proceeding from a private driveway; that a higher degree of care is required of a driver entering a public highway from a private driveway; and that such driver is required to yield the right-of-way to vehicles approaching on such public highway. § 39-752, R. R. S. 1943.

There is considerable testimony with reference to the highway in question being under construction and the placing of detour signs, blockades, and other warning signs to travelers not to drive on the highway. The highway was completed some 2 weeks or 30 days prior to its being officially opened, and was used by the public without interference on the part of public officials, and apparently with their knowledge and consent. In the vicinity of the accident and at the intersection there were no warning signs, flares, or warning devices of any type or kind to put a traveler on notice that the highway was closed. There was nothing to indicate or bring notice to the plaintiff or the driver of the Bresley

car that the highway was not open to the public for travel.

Does the fact that the highway was not officially opened until the day following the accident raise the question as to whether or not the intersection of Highway No. 30A and Highway No. 81 was actually an intersection within the meaning of the statute providing rules of the road to be observed at intersecting streets and highways? Does this fact also raise the question that the Bresley car was being driven on a private way, charging such driver with a higher duty of care in approaching and entering a main highway than he would be charged with in operating a vehicle on a main highway?

In Nygaard v. Stull, 146 Neb. 736, 21 N. W. 2d 595, this court held: "The rules of the road fixed by section 39-741, R. S. 1943, extend to all public highways, however created, and to all roads not public highways if used for travel by the public." It must be concluded that the Bresley car was traveling on a public highway and not on a private road, and Highway No. 30A and Highway No. 81 intersect where the accident occurred. Within the meaning of the statute, it is an intersection.

Our research discloses no Nebraska cases similar to the case at bar involving the question of open and closed highways. There are cases from other jurisdictions that deal with the question. Petersen v. Jansen, 236 Wis. 292, 295 N. W. 30, involved an automobile accident which occurred on a newly-laid state highway which had not been opened to public travel, was barricaded to prevent its use as a highway, and was placarded with a sign prohibiting public use as such. There was a 20-foot strip of usable, perfectly safe highway. The plaintiff was an employee of the contractor and was using the highway for business purposes. The defendant drove around a barricade and proceeded along the newly-laid highway. The plaintiff saw the defendant 500 or 600 feet away from him. He was conscious of the approaching vehicle until the time of the accident. The plaintiff's

principal contention was that the defendant, who passed the barricade shutting off this highway and who violated the notice prohibiting its use for travel, traveled the closed highway at his peril, and that he was a trespasser. The court said that the plaintiff was aware of the defendant's truck being on the highway from the time he saw it until the time of the accident; and that the plaintiff owed the driver of the truck and its occupants the duty at least not to increase their danger or injure them by active negligence. This rule would apply even if defendants were held to be trespassers. The jury found him guilty of active negligence and of greater negligence than the defendant. Under these circumstances, the fact that the road was barricaded was of no materiality, and the principal contention of the plaintiff must fail. The court did state that the statutory rules of the road were not applicable.

A case more closely in point is Pestotnik v. Balliet, 233 Iowa 1047, 10 N. W. 2d 99, which involved an accident that occurred on a cutoff that had been recently constructed and not officially open for travel, but was being used by the public generally. The appellant argued that the statutes relative to the law of the road did not apply, in that the record failed to show that either the cutoff or Highway No. 169 were open for vehicular travel. There was some evidence that there were signs on the cutoff and on Highway No. 30 to the effect that the cutoff was under construction. There was nothing to indicate that Highway No. 169 was officially closed. The cutoff was not officially open the day of the accident. The defendant admitted that while coming onto the cutoff from Highway No. 30, he noticed a sign "Road under construction." The court said: "We do not think that construction work on the highways would nullify or render inoperative the rules of the road."

The fact that the highway may not have been officially reopened by edict of the Department of Roads and

Irrigation is of no materiality under the facts of the instant case. The statutory rules of the road are applicable. The defendants' contention is without merit.

The defendants contend that the trial court erred in not submitting to the jury the question of contributory negligence on the part of the plaintiff. The defendants pleaded contributory negligence on the part of the plaintiff which, cooperating and concurring with the negligence of her hushand, the driver of the car in which the plaintiff was riding, was the proximate cause of the accident.

The defendants assert that the plaintiff was riding in the front seat; that she felt the car decelerate 500 or 600 feet back of the intersection; that she looked up and knew they were approaching the intersection; that she could see the lights of a vehicle approaching from the east coming west on the north side of the highway; and that she returned to tuning the car radio and paid no further attention, nor did she say anything to her husband or do anything for her own safety. The plaintiff had no knowledge of any negligent driving on the part of her host, or of impending danger on the highway. There is nothing to indicate that the plaintiff should have known that the highway was not officially open to travel, nor was she required to anticipate just what movement the truck would make.

This court, on many occasions, has passed upon the duty of a guest riding in a car to the host. In Bartek v. Glasers Provisions Co., Inc., 160 Neb. 794, 71 N. W. 2d 466, this court said: " 'Ordinarily, the guest passenger in an automobile has a right to assume that the driver is a reasonably safe and careful driver; and the duty to warn him does not arise until some fact or situation out of the usual and ordinary is presented.' Lewis v. Rapid Transit Lines, 126 Neb. 158, 252 N. W. 804. See, also, Hamblen v. Steckley, 148 Neb. 283, 27 N. W. 2d 178."

"The duty of a guest riding in an automobile is to use care in keeping a lookout commensurate with that

of an ordinarily prudent person under like circumstances. The guest is not required to use the same degree of care as devolves upon the driver. If the guest perceives danger, or if at certain times and places should anticipate danger, he should warn the driver. Ordinarily the guest need not watch the road or advise the driver in the management of the automobile." Styskal v. Brickey, 158 Neb. 208, 62 N. W. 2d 854.

Where there is no evidence to sustain a finding of contributory negligence it is error to instruct on the subject and thereby submit to the jury an issue not supported by evidence. See Scott v. Service Pipe Line Co., 159 Neb. 36, 65 N. W. 2d 219. The trial court did not err in not submitting the issue of contributory negligence to the jury.

The defendants complain of rulings made by the trial court in striking certain testimony of defendants' driver, Nelson; in permitting, over objections, a witness to testify that he had not been arrested for using the highway; and in sustaining objections to patrolman Clark's testimony with reference to certain road signs and detour signs. With reference to the last proposition, there was evidence of other witnesses as to road signs and detour signs on this highway. We find no prejudicial error in the ruling of the trial court. In any event, it was at most harmless error and insufficient to cause a reversal of the judgment. See Gorman v. Bratka, 139 Neb. 84, 296 N. W. 456.

The defendants contend that the trial court erred in admitting the expectancy tables in evidence for the reason that there was no evidence introduced by the plaintiff that the injuries sustained by her were of a permanent nature, citing Welstead v. Ryan Const. Co., 160 Neb. 87, 69 N. W. 2d 308.

The life expectancy tables were admitted into evidence upon testimony of both plaintiff and defense specialists that the plaintiff was disabled with pain at the time of trial, some 14 months following the accident.

The plaintiff's doctor testified this pain might last for a period of months, or it might continue indefinitely. The defendants' specialist found no functional disability, but testified that while the pain itself was evidence of permanent disability, he expected the pain to lessen with the passage of time. The plaintiff and all the doctors were allowed to testify with reference to continued pain, its probable duration, and the conclusion that this was the only permanent disability involved. Dr. Redgwick was permitted to testify without objection concerning the sizeable extent of the callus formation, the lasting effect of traumatic miscarriage, and the permanent disability associated with Caesarean sections. The defense made no effort to exclude any of this testimony. The evidence tends to show eight serious fractures in vital portions of plaintiff's body, a brain concussion resulting in temporary unconsciousness, and a lessening of plaintiff's chances to ever again give a normal birth. The evidence tended to prove some permanent injury and disability to the plaintiff, but this issue was not submitted to the jury. The record discloses no indication that the admission of the expectancy tables into evidence prejudiced the jury. See, Lyons v. Joseph, 124 Neb. 442, 246 N. W. 859; Mischo v. Von Dohren, 126 Neb. 164, 252 N. W. 830.

The defendants contend that the verdict was excessive. The record discloses that the plaintiff sustained a brain concussion which caused a temporary loss of consciousness, a severe laceration of her head which eventually resulted in suturing, severe shock, bleeding, continuous pain, and mental anguish. Her pelvic bones were fractured in three places, on both sides of the pubic bone and in the sacrum area, and four of her ribs were fractured, plus a fractured vertebra. She was removed from the Osceola hospital and transferred to the Offutt Air Force Base hospital. She underwent 7 days and nights of irregular child labor without the benefit of heavy narcotics to relieve the pain, and then underwent

surgery in giving premature birth to her child. She spent 26 more days in the hospital, suffering pain from her fractures. The next 10 days she spent on crutches, followed by 13 months of backache, rib ache, shoulder ache, and limping about the house. She was unable to do her housework or engage in any of her normal recreational activities. There is no showing in the record to indicate passion or prejudice on the part of the jury in arriving at the verdict.

"A verdict may be set aside as excessive only when it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, or mistake, or that it is clear that the jury disregarded the evidence or controlling rules of law." Remmenga v. Selk, 152 Neb. 625, 42 N. W. 2d 186.

"The question of the amount of damage is one solely for the jury and its action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of injury and damage proved." Peacock v. J. L. Brandeis & Sons, 157 Neb. 514, 60 N. W. 2d 643. See, also, Crecelius v. Gamble-Skogmo, Inc., 144 Neb. 394, 13 N. W. 2d 627.

We conclude that under the evidence and the cited authorities the verdict is not excessive.

The defendants contend that the trial court erred in submitting to the jury the question of the negligence of defendants' driver in failing to sound his horn.

In instruction No. 1, the court recited the charges of negligence pleaded by the plaintiff among which was the following: "He (defendants' driver) failed to make timely sounding of his horn at any time before the collision when to have done so might have avoided the accident." The defendants assert that defendants' driver was excused from sounding his horn because the driver of the car in which the plaintiff was riding had knowledge of the truck approaching from the east when he was 500 or 600 feet distant from where the accident oc-

curred. The evidence shows that at that time the truck was proceeding straight west on the north side of the cement island and could have in no way affected the movement of the Bresley car if its driver had continued straight west, turned to the right, or stopped in the storage lane to permit eastbound traffic to clear the intersection. It was the turning to the left across the lane of traffic going east which created the emergency, and if defendants' driver had sounded his horn just before making the turn or while in the process of making the turn, an accident might have been avoided.

"The duty of a driver of a motor vehicle to sound a horn or give a warning of its approach is not an absolute one but it depends upon the circumstances." Long v. Whalen, 160 Neb. 813, 71 N. W. 2d 496.

The plaintiff had no advance warning that the automobile she was riding in would suddenly cross paths with a second vehicle proceeding due west as the truck was doing. We conclude that the trial court did not commit prejudicial error as contended for by the defendants.

The defendants complain of instruction No. 1, that the defendants' driver failed to yield the right-of-way at the intersection, wherein the court, in reciting the charges of negligence in the plaintiff's petition, stated: "He failed to yield the right of way to the plaintiff vehicle which was proceeding eastward in its own proper lane of traffic." The court instructed the jury on the rules of the road as the same apply to the instant case. The defendants do not attack such instructions.

Regardless of which vehicle may have entered the intersection first, the defendants' driver acquired no right-of-way to make the turn to the left until he gave a visible signal of his intention to do so. The arm signal which defendants' driver claimed he made could in no event be seen by the occupants of the Bresley car. The truck was not equipped with signal lights. The trial court did not commit prejudicial error as contended for by the defendants.

The defendants complain that the trial court erred in giving instructions Nos. 21 and 22 on its own motion. These instructions had to do with the question as to whether or not the highway was open to public travel. This phase of the case has been discussed previously. As to instruction No. 21, it defined the term "highway" as provided for by statute. The court then told the jury: "Therefore if you find that on November 7, 1954 at the time of this accident the public highway between Clarks and the intersection of highways 30-A - 92 and 81 was not open to public traffic you will find that the machine in which plaintiff was riding was not, while on that section of the road, upon a public highway."

Instruction No. 22 is as follows: "Considerable evidence has been introduced relating to the question of whether or not highway 30-A and 92 west of the intersection where the accident occurred was closed or open for traffic. You should consider this evidence together with all of the other evidence in the case in determining whether or not under the rules set out in these instructions the driver of defendants' truck and the driver of the car in which plaintiff was riding exercised due care considering the condition of the highway and the traffic thereon."

The objection to the instructions is that they are in conflict and that one nullifies the other. It is apparent that the defendants make no objection to instruction No. 21, it being almost identical with an instruction tendered by the defendants on this subject. What instruction No. 22 did was to submit to the jury the question of whether or not each of the drivers exercised due care considering the situation, the circumstances, the condition of the highway, and traffic thereon. We find no prejudicial error in the giving of such instructions.

The defendants complain of instruction No. 3 wherein the trial court virtually copied the reply of the plaintiff. This instruction had reference to the plaintiff's

driver having the Bresley car under reasonable control and operating it at all times as a reasonable and prudent person, and, in addition, in copying that part of the reply to the effect that the highway was open to members of the general public 2 weeks prior to the time of the accident. The defendants assert such facts are not sustained by the evidence and the trial court committed prejudicial error by copying that part of the reply in instruction No. 3.

In Remmenga v. Selk, *supra,* this court said: "While this court has frequently criticized the practice of copying pleadings into the instructions as a method of stating the issues to the jury, such practice does not constitute reversible error unless it has resulted in prejudice to the complaining party. The criticism is based primarily on the danger of including allegations of negligence upon which no evidence has been offered. It is fundamental, of course, that it is reversible error to submit issues to a jury upon which no evidence has been offered. Where pleadings, though voluminous, are copied into the instructions as a statement of the issues to be determined, no error can be predicated thereon if there is evidence to sustain all the pertinent allegations included therein and prejudice to the complaining party does not otherwise appear. Franks v. Jirdon, 146 Neb. 585, 20 N. W. 2d 597; Allen v. Clark, 148 Neb. 627, 28 N. W. 2d 439."

We do not think the jury could have been misled by the language in view of the instructions as a whole, and therefore come to the conclusion that the trial court did not commit prejudicial error.

The defendants contend that instruction No. 23 given by the trial court was prejudicially erroneous.

Instruction No. 23 reads as follows: "If you find for the plaintiff you will then proceed to assess the amount of plaintiff's damages at such sum as will fairly and reasonably compensate her for any and all injury, pain, suffering and loss which the evidence shows with

reasonable certainty proximately to have been caused by defendants' negligence. You should also consider and make allowance for any future pain and suffering of plaintiff if you find that the evidence shows with reasonable certainty that she will have such, as a result of defendants' negligence, and if the evidence also shows with reasonable certainty how long it will continue. No allowance should be made upon the basis of conjecture or guess."

The defendants' objection to the instruction is that it submits to the jury the question of future pain and suffering of the plaintiff which is not sustained by the record with reasonable certainty. The evidence shows that prior to the accident the plaintiff was in good health. The plaintiff suffered pain immediately after the accident occurred and was suffering pain at the time of trial. According to the medical testimony, the plaintiff would continue to suffer pain in the future for an undeterminable period. The court, by giving such instruction, did nothing more than permit the jury to make allowance for such future pain and suffering of plaintiff as might be established by the evidence with reasonable certainty, contingent upon the evidence also showing with reasonable certainty how long such future pain and suffering might continue, and subject to the warning of the court that no allowance should be made upon the basis of conjecture or guess.

A plaintiff is required to prove that there is a reasonable certainty of future pain and suffering. See Crecelius v. Gamble-Skogmo, Inc., *supra*. See, also, McDuffie v. Root, 300 Mich. 286, 1 N. W. 2d 544.

We find the evidence sufficient to warrant submission of this issue to the jury, and the giving of the above instruction did not constitute prejudicial error.

Where instructions given, considered in their entirety, fairly and adequately state the law, they are sufficient. See, Clausen v. Johnson, 124 Neb. 280, 246 N. W. 458;

In re Estate of Kinsey, 152 Neb. 95, 40 N. W. 2d 526; Brown v. Hyslop, 153 Neb. 669, 45 N. W. 2d 743.

The verdict of the jury is amply sustained by the evidence. The judgment is affirmed.

AFFIRMED.

IN RE APPLICATION OF RAYMOND L. MILLER FOR A WRIT OF HABEAS CORPUS.

STATE OF NEBRASKA EX REL. RAYMOND L. MILLER, APPELLEE, V. N. P. CAVETT, SHERIFF, FIRST AND REAL NAME UNKNOWN, ET AL., APPELLANTS.

80 N. W. 2d 692

Filed January 25, 1957. No. 34044.

1. **Appeal and Error.** It is error for the district court to dismiss an appeal from the judgment of a county court for a defective or insufficient bond where the bond given substantially complies with the statutory provisions and is signed by a surety and approved by the county judge.
2. **Habeas Corpus: Appeal and Error.** The words "acting under authority of a bench warrant issued by the Clerk of the District Court of Crawford County, Iowa," following the name of the respondent sheriff in an appeal bond in a habeas corpus proceeding, are mere surplusage and do not have the effect of changing the issues or parties to the appeal.
3. ———: ———. In an appeal to the district court from an order discharging the relator in a habeas corpus proceeding, the relator assumes the position of plaintiff and the respondent that of the defendant within the meaning of section 27-1306, R. R. S. 1943.
4. ———: ———. In an appeal to the district court in a habeas corpus proceeding, it is not required that a writ be issued by the district court. Jurisdiction over the parties obtains by virtue of the appeal.

APPEAL from the district court for Johnson County: VIRGIL FALLOON, JUDGE. *Reversed and remanded.*

Clarence S. Beck, Attorney General, *Richard H. Williams, Kent Emery,* and *Raymond B. Morrissey,* for appellants.

Robert S. Finn and *Dwight Griffiths*, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CARTER, J.

This is an appeal in a habeas corpus proceeding from an order of the district court for Johnson County dismissing the appeal of Arvid J. Olson, sheriff of said county, from the judgment of the county court discharging the appellee from the sheriff's custody.

The motion to dismiss was based on three primary reasons: First, that the purported appeal bond was fatally defective; second, that the purported bond was not given by a party against whom the judgment was entered in the county court; and third, that the respondent sheriff failed to plead in the district court within the time prescribed by statute. The motion to dismiss was sustained generally and a dismissal of the appeal entered.

The record shows that a petition for habeas corpus was filed on November 1, 1955, in the county court of Johnson County by the appellee, whom we shall hereafter refer to as the relator. The writ was duly allowed and issued. The respondent sheriff filed an answer and return to the writ in which he stated in part that he was lawfully detaining and confining the relator pursuant to a warrant executed and issued by the Governor of Nebraska on the request of the Governor of the State of Iowa. A reply to the answer and return of the respondent Olson was duly filed. Upon the issues thus made, and after a hearing, the county court on November 8, 1955, discharged the relator and fixed the appeal bond at $500. Notice of appeal was given on November 10, 1955. An appeal bond was approved and filed by the county court on November 10, 1955. The relator was admitted to bail in the sum of $2,000 and an appearance bond was duly filed and approved on November 23, 1955.

The relator filed his petition for habeas corpus in the district court on December 27, 1955, the 49th day after the judgment was entered in the county court. On January 12, 1956, the respondent Olson, who will be treated as the appellant for the purposes of this appeal, filed a motion to strike portions of the petition. On March 23, 1956, relator filed a motion to dismiss the appeal, which motion was sustained on April 9, 1956. Notice of appeal to this court was given on April 16, 1956. The correctness of the appeal to this court is not in controversy.

It is contended by the relator that the appeal bond was fatally defective in that it provides that if judgment be adjudged against the respondent on appeal he will satisfy such judgment for costs instead of providing that the bond shall be double the amount of the judgment and costs, as required by section 24-544, R. R. S. 1943. It is clear that the only money judgment that could be entered was for the costs of the action. The bond was therefore sufficient to meet the requirements of the statute. It cannot logically be said that a bond for double the amount of a judgment and costs must be given when no judgment in any amount was, or can be, entered. It is urged also that the bond is without effect for the reason that the indemnity provisions of the bond provide only that the surety shall pay the costs in full in case of an adverse decision without fixing therein the amount of the bond. The recitals in the bond show that the county court fixed the amount of the appeal bond in the sum of $500. While the bond is irregular in form, it is sufficient to lodge jurisdiction of the case in district court. The irregularities of the bond are such that the trial court could properly require the filing of an amended bond to eliminate the irregularities found in the original. It is not an appeal bond which is so fallacious as to be no bond at all.

The bond was approved and filed by the county judge. Such a bond is not void although it fails to comply with

all the formalities of the law. In such cases the district court may permit or require the filing of a new bond, but it may not properly dismiss an appeal where it is possible to amend or replace the irregular bond. Northup v. Bathrick, 78 Neb. 62, 110 N. W. 685; Rube v. Cedar County, 35 Neb. 896, 53 N. W. 1009; Farrell v. Reed, 46 Neb. 258, 64 N. W. 959; Thomas v. Carson, 46 Neb. 765, 65 N. W. 899.

It is next contended that the bond was not given by a party against whom the judgment was entered in the county court. The basis of this contention is that the respondent sheriff caused to be inserted in the bond a description of himself as "Sheriff of Johnson County, Nebraska, acting under authority of a bench warrant issued by the Clerk of the District Court of Crawford County, Iowa." It is contended that in the county court the respondent was acting under a warrant executed and issued by the Governor of Nebraska, and that the change in terms in the bond has the effect of changing the parties and issues on the appeal. There is no merit to this contention. The issues are made up by pleadings and not the terms of the appeal bond. The use of the words "acting under authority of a bench warrant issued by the Clerk of the District Court of Crawford County, Iowa," is an additional and unnecessary description, and constitutes a mere surplusage. The description of the respondent as the sheriff of Johnson County, Nebraska, properly identifies him as the person to whom the warrant issued by the Governor was directed and the person who appeared as the respondent in the county court. There was, therefore, neither a change of parties nor issues resulting from the surplusage contained in the bond.

The relator contends that on an appeal from the county court to the district court in a habeas corpus case, it is the duty of the respondent to file a petition in the district court under section 27-1306, R. R. S. 1943. The proceedings upon a writ of habeas corpus may be reviewed as provided by law in civil actions. § 29-2823,

R. R. S. 1943. In the case of an appeal to the district court in a civil action the plaintiff in the court below shall be the plaintiff in the district court, and the parties shall proceed, in all respects, in the same manner as though the action had been originally instituted in the district court. § 27-1305, R. R. S. 1943. Section 27-1306, R. R. S. 1943, provides: "In all cases of appeal from the county court or a justice of the peace, the plaintiff in the court below shall, within fifty days from and after the date of the rendition of the judgment in the court below, file his petition as required in civil cases in the district court, and the answer shall be filed and issue joined as in cases commenced in such appellate court."

The foregoing-quoted statute clearly provides that the plaintiff, the moving party in the bringing of the action, is required to file his petition on appeal in the district court. In a habeas corpus proceeding the relator is the moving party and corresponds to the plaintiff in an ordinary civil action. This court considered this matter in In re Estate of Kothe, 131 Neb. 780, 270 N. W. 117, and therein stated: "The administrators contend that the heir at law is the plaintiff and, under this statute, was required to file a petition in the district court within the time designated, and that having failed to do so motion for nonsuit should have been sustained. We think this contention is unsound. The proceeding in the county court was instituted by the administrators in filing their final report and petition seeking its approval and allowance and for their discharge. They invoked the jurisdiction of that court and sought relief by their action. Pursuant to statute, notice was given of the hearing. The heir at law appeared, filed objections, contested the application of the administrators for discharge, and objected to allowance of their report on numerous grounds. While opposing litigants in that case were not designated as plaintiff and defendant, yet the administrators were the ones who instituted the proceedings

and therefore stand as the plaintiffs. The heir at law resisted the demands of the administrators and occupies the position of defendant. We are of the opinion that, under the statute, it was the duty of the administrators to file petition in the district court and that such duty did not rest upon the heir at law. The motion for nonsuit was properly denied." See, also, In re Estate of Myers, 152 Neb. 165, 40 N. W. 2d 536.

Under the foregoing authority the relator as the party instituting the proceeding in the county court stands in the position of plaintiff on appeal within the meaning of section 27-1306, R. R. S. 1943. The respondent having appeared in county court in resistance to the writ assumes the position of defendant on appeal. Consequently, the respondent was under no duty to file a petition on appeal in the district court as contended by the relator.

It is contended also by the respondent that he is not required to file his answer and return to the writ in the district court on appeal until the district court issues a new writ. This contention has no merit. A writ was issued and served in the county court. Jurisdiction over the parties is obtained in the district court by virtue of the appeal. A second writ of habeas corpus is no more required on appeal than a second summons in an ordinary civil appeal. See Tail v. Olson, 144 Neb. 820, 14 N. W. 2d 840.

We conclude for the reasons herein stated that the district court was in error in dismissing the appeal of the respondent Olson. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

ELMER JACOBSEN, APPELLEE, V. VIVIAN POLAND, APPELLANT.
80 N. W. 2d 891

Filed January 25, 1957. No. 34049.

1. **Trial.** It is for the jury to determine controverted issues of fact in a law action if the evidence is in dispute.
2. **Damages.** Diminution of earning capacity is not, of necessity, measured by its diminution in the particular calling in which plaintiff was engaged at the time of the injury, or by the amount of wages which he was then receiving; hence, plaintiff may show that he was capable of earning more than he was earnisg at the time of the injury, and the jury may consider what plaintiff might have been able to earn but for the injury in any employment for which he was fitted.
3. **Damages: Evidence.** If there has been permanent impairment of earning capacity, for the purpose of deciding the amount of damages to be awarded, evidence as to earnings of the plaintiff for a reasonable period before the injury may be received and considered.
4. ———: ———. There is no definitive rule for determination in all cases what is a reasonable period in this regard but this must be decided upon consideration of the circumstances of each case.
5. ———: ———. Whether or not evidence of this character is too remote in time to be admissible is generally for the trial court to determine in the exercise of a sound discretion.
6. ———: ———. This class of evidence is competent not as furnishing an arbitrary measure of damages but as assistance in enabling the jury to exercise a sound and just discretion in deciding the proper amount to be awarded for the impairment or loss of earning capacity.
7. **Torts: Damages.** In an action for personal injury plaintiff may recover all the damages proximately caused by the tort under a general allegation of the gross amount of the damages caused, including damages for impairment of his capacity to earn money.
8. **Damages: Evidence.** Evidence of the prevailing rate of discount for the period involved is proper in a case requiring the jury to determine the present value of money payable in the future but interest rates and other forms of returns on money safely invested are matters of such common knowledge that jurors will be presumed to be able to make proper allowance therefor in estimating the present value of a sum of money payable in the future though no evidence on that subject is introduced.

9. **Damages: Trial.** The future pain and suffering which a jury is entitled to consider in the assessment of damages are such as the evidence shows with reasonable certainty will be experienced by the injured person.

APPEAL from the district court for Custer County: ELDRIDGE G. REED, JUDGE. *Affirmed.*

John E. Dougherty and *Thomas W. Lanigan,* for appellant.

Miles N. Lee and *Tedd C. Huston,* for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

BOSLAUGH, J.

Appellee demands damages from appellant on account of injuries he suffered because of a collision of an automobile operated by appellant and an automobile in which appellee was a guest as a result, as appellee alleges, of the negligence of appellant.

The substance of the cause of action of appellee is that on November 8, 1953, he was riding as a guest in an automobile traveling in a lawful manner towards the south on a public highway at the crest of a hill about 2½ miles south of Gates Store in Custer County; that appellant was operating his automobile towards the north on the highway at that time and place in a negligent manner on the left or west side of the center of the highway directly towards the automobile in which appellee was traveling in its proper right or west lane of travel; that the driver of the automobile in which appellee was riding as he came to the crest of the hill obtained a view of the automobile of appellant when it was a short distance from and was moving directly towards the car in which appellee was riding and the driver thereof in an effort to avoid a collision turned the automobile sharply and abruptly to the left on the east part of the highway and appellant drove his automobile toward the east side of the road and thereby

caused a head-on collision between the automobiles; that the negligence of appellant which proximately caused injuries to appellee was that he operated his automobile on the wrong side of the highway, that he failed to have a proper lookout for other vehicles traveling on the highway, and that he failed to have reasonable control of his automobile preceding and at the time of the collision; and that serious injuries were inflicted on appellee as a consequence whereof he is permanently and totally disabled.

Appellant denies the version of the accident alleged by appellee except appellant admits the collision at the time and place as stated and pleads that the collision of the automobiles was caused by the driver of the one in which appellee was riding operating it at a speed of 65 to 70 miles per hour on the east side of the highway directly in front of and against the automobile of appellant as he was lawfully proceeding toward the north up the hill to its crest; and that any injuries suffered or damages sustained by appellee as a result of the collision were caused by the negligence of the driver of the automobile in which appellee was riding which cooperated and concurred with negligent acts and omissions of appellee which were more than slight. Appellant specified numerous acts of negligence of the driver of the car in which appellee was riding and many separate acts of negligence of appellee. They are not further mentioned because they were resolved by the jury adversely to appellant and consequently they are unimportant if the verdict is a legal one.

Appellee traversed the affirmative statements made in the pleading of appellant.

Appellee prevailed in the district court. The judgment in his favor and the denial of the motion for a new trial are the occasion of and the subject of this appeal.

Appellee was on November 8, 1953, traveling from Gates Store where he lived in Custer County with the intention of going to Broken Bow to attend the wedding

of his son. He was a guest in an automobile owned and operated by his son-in-law, Richard Embree, which will be designated the Embree car. Appellee occupied the left side of the rear seat. His wife was to his right, a granddaughter to her right, and a son of appellee was also in the rear part of the car. The driver of the automobile and his wife occupied the front seat. They started from Gates Store about 1 o'clock p. m. and proceeded south on a graveled highway. The part of the road that was surfaced was about 24 feet wide. It was affected by melting snow and its condition varied from dry to wet and muddy. There was quite a large hill, the crest or summit of which was about 2½ miles south of the Gates Store. It was identified as Myers Hill. It was about ⅛ of a mile from the bottom of it to the top on both the north and on the south. The road was quite badly eroded at the north bottom of the hill where water had collected and a considerable mudhole had resulted. The area of the mudhole was irregular, bumpy, and had ruts through it. The speed of the car was reduced and the car was put in second or intermediate gear. The speed of the car through the mudhole was 15 to 20 miles per hour. The highway on the north side of the hill was wet and muddy because of melting snow. The automobile was continued in second or intermediate gear while it proceeded up the north side of the hill until it was near the summit and immediately before the automobile of appellant came into view of the driver of the Embree car and its occupants. The Embree car as it proceeded up the hill and until immediately before the accident, the subject of this case, was operated on the west or right-hand portion of the highway with the west side of the car 3 or 4 feet from the west edge of the shoulder.

When the Embree car approached the summit of the hill its driver, Richard Embree, saw an automobile traveling directly towards him on the west side of the highway a distance to the south of 100 to 150 feet at a

speed of 35 miles per hour. It was a Chrysler car operated by appellant. It was proceeding north with its west side within 3 or 4 feet of the west shoulder of the highway. The speed of the Embree car was then about the same as the speed of the Chrysler car. The first thing Embree saw as his automobile was coming up to the crest of the hill was the ornament on the front of the hood of the Chrysler car driven by appellant. The space between the two automobiles was rapidly closing. Embree immediately turned his car to the right when he realized there was a drop of 3 or 4 feet to his right, there was a ditch there, a lot of snow to his right, and several feet west of that was a bank where the grader had cut through the hill. The automobile of appellant had not changed its course or decreased its speed. Embree then realized he could not escape to the right and he suddenly turned to the left in an attempt to avoid a collision of the automobiles. The only open and unoccupied part of the highway was to the east. At the precise time Embree moved his car towards the east the appellant turned and operated his car to his right or to the east and drove it into and against the Embree car about the middle or slightly east of the middle of the highway. The time between when the automobile of appellant came into view of Embree and when it collided with the Embree car was only 2 or 3 seconds. The Embree car was far enough to the east that if the automobile of appellant had continued directly north there would have been no contact of the vehicles.

The Chrysler automobile struck the Embree car with great force. The front of it was greatly damaged. The doors on the left side were forced open, and the steering assembly was broken and shoved against the windshield. The occupants were thrown against and about the car and all of them were injured, some more seriously than others. The wife of Embree was forced against and through the windshield. The appellee was partly in and partly out of the car and he sustained a

severely comminuted fracture through the intertrochanteric and subtrochanteric region of the left femur over a distance of approximately 8 inches, a transverse comminuted fracture of the junction of the middle and upper thirds of the left tibia, and a fracture of the fibula at about the same level.

The Embree car was moving southward at the time of the collision. It was several feet from the east side of the highway when it came to rest. The skid marks in the road behind the car extended to the west side of it and indicated that the car had moved from the northwest. The rear right wheel of the car was about a foot or a foot and a half from the center of the highway. The automobile of appellant stopped with its rear wheels to the west of the center of the highway and its front to the northeast. The extreme rear of the car was not far from the west edge of the road. It was equipped with deep-tread or mud tires. The tracks of the tires were visible for a considerable distance down the hill to the south. They were on the west side of the highway with the west one 3 or 4 feet from the west shoulder. There were 3 or 4 feet of tire tracks directly in front of the front wheels of the Chrysler car indicating that it had been forced back by its impact with the Embree car. The damage to the automobile of appellant was largely to the left front. The entire front of the Embree car was damaged. The highway on the south side of the hill was in much better condition than on the north side and the east half of the road on the south side was substantially dry and in some better condition than the west side of the road at that place. There was no condition of the road up the south side of the hill that made it impracticable for any traveler on the road to observe the requirements of the law of the road. There was no other traffic at or near the site of the collision other than the automobiles of Embree and the appellant.

The evidence produced by appellant was that the day

of the accident he was driving his automobile north up the Myers Hill on the right or east side of the highway; that the east side of his car was about 2 or 2½ feet west of the east edge of the road; that he did not at any time that day have or operate his automobile west of the center of the road at that location; that when he came to the top of the hill the Embree car came from the north on the east side of the road traveling at a speed of about 70 to 75 miles per hour; that it struck the automobile of appellant and forced it back towards the southwest about 15 to 20 feet; that when his car came to rest after the collision it was standing astride the center line of the road; that the Embree car was in about the center of the east lane of the highway; and that appellant had many conversations with appellee and his wife after November 8, 1953, until this litigation was commenced about the collision of the cars and what had happened as a result of it and neither appellee nor his wife had ever made any claim that appellant was responsible for the accident and the injuries caused appellee.

The evidence is obviously in conflict as to the manner and cause of the collision of the automobiles which resulted in the injuries to appellee. It presents a case that was required to be determined by the jury. There is no assignment or argument on this appeal that the evidence is not sufficient to sustain the verdict of the jury. It is for the jury to determine controverted issues of fact in a law action if the evidence is in dispute. Long v. Whalen, 160 Neb. 813, 71 N. W. 2d 496; Barney v. Adcock, 162 Neb. 179, 75 N. W. 2d 683. The fact that appellee was successful in the trial court makes it necessary for this court to consider the evidence and reasonable inferences from it most favorably to him. In the absence of any prejudicial error of law in the case the verdict of the jury is conclusive of all issues of fact in favor of appellee.

There was proof produced by appellee that he en-

gaged in the welding business as a welder in the year 1925 and he continued to work as a welder until and through the year 1950. He worked in four or five states for gas companies and the United States. He was employed at the Navy Yard at Bremerton, Washington, from 1942 to 1945. His last engagement as a welder was at Broken Bow. It was concluded with the year 1950. He earned during that year as a welder in excess of $5,000 and his average yearly earnings for several years prior thereto were approximately the same as they were in 1950.

Appellant, by process of the court, secured a copy of the income tax return of appellee for each of the years 1952, 1953, and 1954. These were offered in evidence by appellant and, in opposition to objections by appellee, were admitted in evidence and submitted to the jury for examination. Appellant during the cross-examination inquired of appellee concerning his income tax returns when he was working for the government at Bremerton, Washington. He said he did not himself make them. Appellant then asked appellee, "But you do know how much your income was at that time, don't you?" He answered that he did, approximately. Appellee on redirect established that his earnings as a welder at the Bremerton Navy Yard for the year 1943 were $3,755.16 and for the year 1944 were $3,615.84. Appellant elicited by recross-examination that appellee while working at the Navy installation for the years 1942 to 1945 had a civil service status and his compensation was substantially constant. He did not receive "time-and-a-half or double time." He expressed this by saying, "We were frozen on the job."

Appellee during the year 1951 constructed a building at the place referred to as Gates Store and commencing in 1952 conducted a store at that location known as the Gates Trading Post until he was injured in the collision described herein. He operated it with the as-

sistance of his wife. He did not realize from the store venture substantial net profit.

He was not in any way or degree disabled before the collision of the automobiles but, on the contrary, was capable of doing and did do all things necessary to his work and activities until he was injured in and totally and permanently disabled by the accident. He was 49 years of age at that time. There was proof that the reasonable compensation for a welder who was working by the job and not as an employee for another in that community was $3 to $5 per hour and that the fair and reasonable compensation of a welder employed by another welder in that community as $2 per hour or $96 per week.

Appellant contests the legality of the action of the district court in admitting, over objections of incompetency and remoteness, evidence concerning the engagements and earnings of appellee prior to 1951 as a welder and evidence of the reasonable compensation of a welder in the community in Nebraska where appellee was resident and had carried on his trade as a welder. The essence of the argument of appellant in this respect is that the evidence of the earning capacity of appellee should have been restricted to his activities as a rural storekeeper during the period of less than 3 years from the time he discontinued work as a welder with the commencement of the year 1951 until he sustained injuries on November 8, 1953, resulting in his total and permanent disability.

The authorities are not unanimous concerning the contentions made by the parties on this phase of the case. The view generally adopted by the courts is that if there has been permanent impairment or loss of earning capacity, in deciding the amount of damages to be awarded, evidence is not restricted to that of the earnings of the injured person at the time of the injury; that upon the issue of the amount of recovery in an action for personal injury, evidence as to earnings for a

reasonable period before the injury may be received but courts disagree as to what constitutes a reasonable time and there is no certain length of time that determines what is a reasonable period in this regard but this must be considered and decided upon the circumstances of each case; and that whether or not evidence of this character is too remote in time to be admissible is generally for the trial court to determine in the exercise of a sound discretion. The purpose of proof of past employment and earnings in litigation of this character is to assist the jury to determine what the future earnings would have been but for the injury. Any prior continuous, as distinguished from temporary, employment and its compensation which may fairly and legitimately throw light upon what the probable earnings would have been is admissible. There is no definitive rule as to time and subject matter of such inquiries.

In Yost v. Nelson, 124 Neb. 33, 245 N. W. 9, it was contended by defendant that the plaintiff was permitted to recover for earning capacity in an occupation in which he was not employed at the time of the accident. The proof showed that plaintiff was by occupation a lineman and that his duties consisted of working on poles and installing wires and equipment. At the time of the accident he was not engaged in that occupation but was assisting in the survey of a gas pipe line for a compensation less than the reasonable wages of a lineman. He was disabled from resuming his occupation as a lineman by the injuries he received. The trial court instructed the jury that in fixing the amount of damages they could take into consideration any impairment shown by the evidence in plaintiff's earning capacity. This court approved the submission made of the case by the district court and announced: "Diminution of earning capacity is not, of necessity, measured by its diminution in the particular calling in which plaintiff was engaged at the time of the injury, or by the amount of wages which he was then receiving; hence, plaintiff may show

that he was capable of earning more than he was earning at the time of the injury, and the jury may consider what plaintiff might have been able to earn but for the injury in any employment for which he was fitted."

In Pawlicki v. Detroit United Ry., 191 Mich. 536, 158 N. W. 162, the court said: "It is seldom in tort actions, and particularly for personal injuries, that exact data can be furnished or found by which to accurately measure the various elements recognized as composing adequate compensation for the loss or injury sustained. The law does not require impossibilities, nor demand a higher degree of certainty than the nature of the case admits. Reasonable latitude is therefore necessarily allowed in the range of inquiry as to damages in actions ex delicto, for which no fixed rule of exclusion or inclusion can be formulated * * *. And as bearing upon the destruction or impairment of plaintiff's earning powers his previous trade or vocation and what he was last able to earn while following it, his age, physical condition, and ability to work when injured, with any other facts which might tend to throw light upon that question, were admissible, 'not as furnishing an arbitrary measure of damages, but as a guide or assistance in enabling the jury to exercise a sound and just discretion in determining the proper amount,' if any."

The circumstances considered in Miller v. Pillow, 337 Mich. 262, 59 N. W. 2d 283, were that the plaintiff engaged in the restaurant business in 1948 and was injured in an automobile accident on July 30, 1950. He was then 54 years of age. He sought the recovery of damages for his injuries which, as he asserted, permanently impaired his ability to perform remunerative work. He produced evidence at the trial that before engaging in the restaurant business he worked at farm labor, as a stationary engineer, an employee in a paper mill, and as a driver of a gasoline tank. The court said: "Testimony was offered as to wages customarily paid

in such lines of employment, evidently on the theory that plaintiff, had he not been injured, might have engaged in any of the various lines of employment in which he had had experience previously, and might have earned wages therein as an ordinary laborer. Objections were made to such testimony on the ground that plaintiff was at the time of the accident operating a restaurant, and that proofs as to his loss of earning ability should be confined to that character of work. The objections were overruled and the jury was permitted to consider the testimony for its bearing on the general issue as to plaintiff's loss of earning ability. * * * Certainly the testimony as to the different kinds of labor in which plaintiff had engaged was competent. * * * Being competent to pursue various lines of employment, no reason is apparent for precluding him from showing what he might earn in different kinds of labor that he had performed in the past, and which he would have been capable of performing in the future had he not been injured by defendant's negligence. There was no error in the admission of the testimony in question."

It is stated in Grand Trunk Western Ry. Co. v. Reddick, 160 F. 898: "Upon the question of the damages sustained by the wife and children of a person killed by reason of his death, it was not error to permit the health, character, and earning capacity of the deceased to be shown for the period extending back from the time of his death to his young manhood; and in such connection evidence showing his earnings during the time of a partnership formed for carrying on his trade as a skilled workman 15 years before his death was admissible."

In Oakes v. Maine Central R. R. Co., 95 Me. 103, 49 A. 418, testimony was admitted, over objections, as to the wages the deceased received as a milliner 11 years before her death. That was her last employment. The court approved the reception of the evidence by this language: "The damages in this class of cases can

never be the subject of precise mathematical demonstration or calculation. They are based upon the probabilities of the future, which can only be shown by the facts of the past. Evidence is received in regard to many matters which in other actions for personal injuries are irrelevant or immaterial. * * * The earning capacity of the deceased was an important consideration, and this necessarily included not only her physical ability to labor, but the probabilities of her being able to obtain profitable employment. * * * Evidence of the wages she received the last time she was employed at that trade was properly admitted as tending to show whether such an effort, if made, would be successful; not as a direct basis for computing her earnings, or the value of her life at so much per week; but as showing an ability and capacity on her part to obtain continuous, profitable employment, should she be deprived of the help of her husband and thrown upon her own resources for the support of herself and her child."

The plaintiff in Germ v. City & County of San Francisco, 99 Cal. App. 2d 404, 222 P. 2d 122, went to California in 1942. Prior thereto he had worked with considerable lack of continuity in underground mining in Minnesota and as a laborer in the car department of a railroad. During a period of about 3 years after he reached California his earnings for working in a shipyard and as a farm laborer were about $800. He was injured in an accident in the year 1945. He was then unemployed and was living on charity in an institution where he had enrolled as early as November 1943. He was permitted to testify in the action occasioned by his injury his estimate of his earnings during the 8 years previous to his injury. The propriety of this testimony was contested. The court said: "The earnings prior to the injury are admissible as evidence of the extent to which the earning capacity of the plaintiff has been impaired by the injury. * * * the best method of proof of pecuniary loss is testimony of the plaintiff as to his

earnings for a number of years immediately prior to the accident. * * * There is no express limitation upon the time which this testimony may cover. The remoteness of the time affects the weight of the testimony and not its admissibility. The fact that the injured person was not employed at the time of the accident does not necessarily deprive him of the right to compensation for the loss of his earning capacity."

The Texas court in El Paso Electric Ry. Co. v. Murphy, 49 Tex. Civ. App. 586, 109 S. W. 489, observed: "Loss of or impairment of earning capacity is not always easy of calculation; it involves an inquiry into the value of the labor, physical or intellectual, of the person injured, before the accident happened to him, and the ability of the same person to earn money by labor, physical or intellectual, after the injury was received. Any evidence reasonably tending to show, either by itself or in connection with other evidence, what loss or impairment of such capacity has been sustained by the injured party, is relevant to the issue. * * * and evidence that one earned a salary of a certain amount, though years before he was injured, if it be shown that he possessed the same qualities just before he was injured as he did when he made such earnings, is, we think, admissible as tending to show what his earning capacity was when he was injured, its weight and probative force to be determined by the jury. For all evidence tending to show the character of the injured party's ordinary pursuits and the extent to which the injury complained of prevented him from following those pursuits is pertinent to the issue of impairment of earning capacity."

Grocers Supply Co. v. Stuckey (Tex. Civ. App.), 152 S. W. 2d 911, involved a claim for personal injuries received by plaintiff as the result of a collision of two motor vehicles on October 20, 1939. The plaintiff produced evidence of his earnings from October of 1929 to April of 1930. Its competency was contested. The court said:

"That testimony cannot be said to have had no advisory effect in enabling the jury to determine the extent of the appellee's earning-power, even 10 years later; that is the principle upon which evidence is receivable of past earnings of one who, by the negligence of another, has been deprived of a part or all of his earning capacity, rather than as having a tendency to, in itself, establish a fixed measure of damages for such a loss—the objective being to thereby furnish the jury a predicate from which they can fairly determine the extent of any shown impairment of earning capacity; indeed, this principle is so well settled that further discussion of it is foreborne."

It is stated in Yuncke v. Welker, 128 W. Va. 299, 36 S. E. 2d 410: "In an action to recover for personal injuries the damages are unliquidated and indeterminate in character, and the assessment of the amount is generally for the jury. * * * The only limitation which the law imposes is that the damages be fairly compensatory and not such as to show partiality, prejudice or misconduct upon the part of the jury. * * * In a personal injury case no rule of law fixes the measure of damages; the law leaves the amount of damages for tort to the sound discretion of the jury. * * * The court, over objection of the defendant, permitted the plaintiff to testify concerning the amount of his earnings as a carpenter within a period of five years prior to the time of his injury. The defendant objects to this evidence as being too remote in time * * *. This contention is not well founded. Whether evidence is too remote in time to be admissible is generally for the trial court to determine in the exercise of a sound discretion. Evidence, 20 Am. Jur. 243; 10 R. C. L. 926; Sorrell v. Scheuer, 209 Ala. 268, 96 So. 216; Raymond v. Flint, 225 Mass. 521, 114 N. E. 811. It does not appear that the admission of this evidence amounted to an abuse of discretion. This Court, in dealing with this subject, has said that an abuse of discretion is more likely to result from

excluding, rather than admitting, evidence that is relevant but which is remote in point of time, place and circumstances, and that the better practice is to admit whatever matters are relevant and leave the question of their weight to the jury, unless the court can clearly see that they are too remote to be material. State v. Yates, 21 W. Va. 761." See, also, Kohl v. Unkel, *ante* p. 257, 79 N. W. 2d 405; Annotation, 130 A. L. R. 164; 25 C. J. S., Damages, § 87, pp. 620 and 625; 15 Am. Jur., Damages, § 338, p. 777; Heinrich v. Ellis, 113 Ind. App. 478, 48 N. E. 2d 96; Southern Ry. Co. v. Stockton, 106 Va. 693, 56 S. E. 713; Peterson v. Seattle Traction Co., 23 Wash. 615, 63 P. 539, 65 P. 543, 53 L. R. A. 586; Skramstad v. Miller, 78 N. D. 450, 49 N. W. 2d 652; District of Columbia v. Woodbury, 136 U. S. 450, 10 S. Ct. 990, 34 L. Ed 472.

There is respectable authority for the view that when it is established that a party has suffered damage, as it is in this case, a liberal rule should be applied in allowing a jury to determine the amount, and that, given proof of damage, uncertainty as to the exact amount does not justify a denial of all recovery. The fact that the amount of damage may not be susceptible of exact proof or may be in a degree uncertain or difficult of ascertainment should not be a bar to any recovery. Smith v. Mendonsa, 108 Cal. App. 2d 540, 238 P. 2d 1039; California Lettuce Growers v. Union Sugar Co., 45 Cal. 2d 474, 289 P. 2d 785, 49 A. L. R. 2d 496; Colvin v. Powell & Co., Inc., *ante* p. 112, 77 N. W. 2d 900.

It is asserted by appellant that appellee had "reached beyond 50 years of age"; that he was not active in the "welding business for more than 5 years immediately preceding the accident"; and that he had abandoned the trade of welding for the status of a storekeeper. Appellant too liberally interprets the proof in his favor. Appellee discontinued his trade as a welder less than 3 years before the accident. There is no other indi-

cation that he had abandoned it with the intention of not returning to it. He was 49 years old when injured and not "beyond 50 years of age."

The facts in Peterson v. Seattle Traction Co., *supra,* were that plaintiff testified he worked as a deck hand on a steamboat for about 6 years ending 3 years before the day of the accident. The defendant claimed that the plaintiff had not been working on a steamboat for 3 years and did not claim to intend to return to that calling; that it could not be regarded as his occupation, whether present or prospective, when he received the injuries; and that his earnings as a steamboat hand had nothing to do with the question of how much his physical impairment due to his injuries might deprive him of earning. The court said: "In an action for damages for injuries occasioned by the negligence of defendant, it is admissible for plaintiff to show what wages would be open to him in a business he understood, though he had not followed it for three years, but which he would have the right and ability to resume, were it not for the injuries he had received."

In Galveston, H. & S. A. Ry. Co. v. Harling (Tex. Civ. App.), 208 S. W. 207, plaintiff testified that during a period of years, 3 to 10 in number, extending back from 2 years prior to the injuries of which he complained, his earnings were $4,000 to $10,000 per year. He was then resident in Boston, Massachusetts. Two years before the accident in which he was injured he removed to Houston, Texas, and engaged in a much less remunerative occupation. The evidence of his earnings in Boston was approved by this language: "The testimony objected to was admissible, 'not as furnishing a means of measure of damages, but as a guide or assistance in enabling the jury to exercise sound and just discretion in determining the proper amount.' It was proper to show what kind of remuneration would be open to the plaintiff in a business he understood, and which he would have the right to resume, were it not for the in-

juries which prevented him from again entering that business." That case was affirmed by the Commission on Appeals of Texas and its action was approved by the Supreme Court of that state. Galveston, H. & S. A. Ry. Co. v. Harling (Tex. Com. App.), 260 S. W. 1016.

In El Paso Electric Ry. Co. v. Murphy, *supra,* this language appears: "It must be observed that the matter to be determined is not what he actually earned before his injury, but what his earning capacity actually was, and to what extent that capacity has been impaired. For whatever capacity he had for earning money before the injury, whether he exercised it or not, was his, and he was entitled to it unimpaired by injury wrongfully inflicted by another. * * * The fact that his capacity could not have been employed in the same business in El Paso that it was in Corpus Christi, did not affect or lessen it; for * * * it existed there unimpaired just as it did before he moved from Corpus Christi. And if he had chosen to employ it in the conduct of such business he would have been free to carry it where such business and employment could be found. * * * we cannot perceive that the remoteness of time and space where he drew such salary, from where he was injured would render the testimony complained of inadmissible. It might not have the same probative force that it would had it been shown that he was earning a salary of that sum at the time his injuries were inflicted. But that would go to the weight of the evidence, to be determined by the jury, rather than its relevancy, to be decided by the court." See, also, Germ v. City & County of San Francisco, *supra;* Pawlicki v. Detroit United Ry., *supra;* Annotation, 130 A. L. R. 164.

Complaint is made by the appellant that the petition did not specially assert that appellee "could not engage in the former calling of welding." This is understood to be a contention that a claim of damages for loss of earning capacity caused by negligence must be specially pleaded or it may not be established by evi-

dence. The specific allegation of damages in the petition is that appellee was before he was injured 48 years of age, in good health, capable of earning in excess of $5,000 a year, and that as a proximate result of negligence of appellant, as detailed by appellee, he had been damaged in a specified gross amount. Appellant made no request for a more specific statement than that pleaded in the petition. In an action for personal injury plaintiff may recover all the damages proximately caused by the tort under a general allegation of the whole amount of the damages caused, including any damages for impairment of his capacity to earn money. Nye v. Adamson, 130 Neb. 887, 266 N. W. 767; Carlile v. Bentley, 81 Neb. 715, 116 N. W. 772.

The experiences of appellee as a welder were not on special occasions or during temporary employment. They were continuous throughout a period of 25 years and to within less than 3 years of the time he was injured. The last years of his activity in that line of work were in the community where the accident occurred which caused his disability. He was able to have continued to pursue his trade but for the injury appellant caused him. The trial court was correct in admitting evidence of the earnings of appellant resulting from his engagements as a welder, evidence of the reasonable wages or compensation of a welder in the community in Nebraska where appellee had worked at his trade, and in the giving of the instruction on this subject to the jury.

There is evidence that when the collision of the automobiles occurred the wife of the driver of the Embree car was thrown against and through the windshield of the car. She was permitted while testifying at the trial to say that she received serious injuries. The trial court explained at the time that her testimony was admitted not for the purpose of showing what her injuries were but what her condition was generally. Likewise Embree testified that he was shaken up and bruised on

his side and knees. The trial judge commented that he permitted this "as a matter of showing what the situation was." The admission of this testimony is cause of appellant claiming prejudicial error. Evidence of this character is permissible in the discretion of the court as tending to show the force of the impact and the extent of the injuries inflicted upon the plaintiff.

The following appears in Day v. Banks (St. Louis Court of Appeals), 143 S. W. 2d 68: "Defendant next complains that the court erred in permitting plaintiff's witness James F. Day to testify that he had received a broken jaw and minor bruises, and that his wife had sustained internal injuries as a result of the accident. Defendant contends that the introduction of such testimony was irrelevant to the issues and created sympathy for plaintiff because the witness and the witness' wife were the father-in-law and mother-in-law, respectively, of plaintiff. We think the evidence complained of was competent and relevant to show the violence of the collision, thereby accounting for the injuries sustained by plaintiff. The court did not err in overruling defendant's objection thereto." See, also, Johnson v. McRee, 66 Cal. App. 2d 524, 152 P. 2d 526; 9C Blashfield (Perm. ed.), Cyclopedia of Automobile Law & Practice, § 6197, p. 312.

The present worth table was offered in evidence. Pp. 1504-1505, R. R. S. 1943. The offer was made by counsel for appellee at the suggestion of counsel for appellant; but after the offer was made, counsel for appellant voiced the objection that it was immaterial. The table was received in evidence. Complaint is now made of this. It has no validity because counsel for appellant was instrumental in inducing the offer and the action of the court in reference to it and for the reason that the record recites that the contents of the table were not made known to the jury at the time it was admitted in evidence and the record fails to show submission of the table to the jury at any time.

The jury was advised by the court that any allowance made by it on account of impairment of the earning capacity of appellee should be the present value of the difference between the amount he would reasonably have been able and expected to earn if he had not been injured and the amount he is and will be able to earn because of his reduced capacity, if any, resulting from the injury he suffered. The court told the jury that the present valuation of a sum of money payable in the future is the amount that sum is worth if paid now. The court, by example, told the jury that the present value of $1 due in 1 year at 6 percent could be found by dividing $1 by $1.06. There was no proof of the rate of discount which should be applied and the jury was not directly charged to find what the rate of discount would be for the period involved. Appellant claims such evidence and instruction were required. He did not propose such an instruction.

The court in Chesapeake & O. N. Ry. Co. v. Adams, 207 Ky. 668, 269 S. W. 1009, said with reference to this subject: "As the Halloway case (246 U. S. 525) holds that the jury cannot be tied down in estimating the present cash value by any fixed rate of interest or any specific period of time, it would seem that about all that could possibly be done in this connection that would at all be helpful would be to submit a mathematical formula to the jury whereby, after determining the rate of interest to be applied and the period of expectancy to be enjoyed, they could work out the discounted value. That this cannot be done practically is clear. Such a mathematical formula is not easy of application and when accurately applied involves the knowledge of more mathematics than can always be found in an ordinary collection of laymen. Jury trials must in the nature of things be conducted along practical lines, and we believe the better rule to be for the parties, if they so desire, to introduce evidence to show what, under the varying conditions of the evidence, the present value

of the expected pecuniary benefits may be, and then leave it to the jury to determine from this evidence what such present value is. In the absence of such evidence, the jury, knowing as men of common sense that a present value of a future fixed sum is a discounted value, must be trusted, as they are trusted in many other respects, to ascertain in their own way what this discounted value is. As the offered instruction would not have helped the jury to decide this issue, and as it told them only what as men of common sense they knew already, it was not error to refuse to give it."

In Western & Atlantic R. R. v. Lochridge, 39 Ga. App. 246, 146 S. E. 776, the court said: "Interest rates and other forms of returns on money safely invested are matters of such common knowledge that intelligent jurors may be presumed to be able to make proper allowance therefor in estimating the present value of a sum of money payable in the future, though no evidence upon that subject is introduced." The conclusion of that court was approved by the Supreme Court of Georgia, 170 Ga. 208, 152 S. E. 474.

In Vicksburg & Meridian R. R. Co. v. Putnam, 118 U. S. 545, 7 S. Ct. 1, 30 L. Ed. 257, the court said: "In order to assist the jury in making such an estimate (a fair recompense for the loss), standard life and annuity tables, showing at any age the probable duration of life, and the present value of a life annuity, are competent evidence. * * * But it has never been held that the rules to be derived from such tables or computations must be the absolute guides of the judgment and the conscience of the jury."

In Coast S. S. Co. v. Brady, 8 F. 2d 16, the court said: "But we are of opinion that the charge is to be construed as merely explaining the method of ascertaining the present value of money payable in the future, and as committing to the discretion of the jury such use of the annuity table as they might consider proper in connection with all the other evidence in the case relating

to the impairment of earning capacity." See, also, Chesapeake & Ohio Ry. Co. v. Kelly, 241 U. S. 485, 36 S. Ct. 630, 60 L. Ed. 1117, L. R. A. 1917F 367. Counsel has not directed the court to any decision which decides that evidence of the rate of discount which should be applied in such a situation is indispensable. The contention of appellant in this regard may not be sustained.

The evidence is without dispute that appellee was seriously injured by the collision of the automobiles; that he has been and will be because of the injuries wholly and permanently disabled; that he has been the victim of pain and suffering continuously since the accident; and that he has submitted to necessary surgical operations and consideration has been given to another operation in an attempt to relieve him from pain and suffering but that it is not and cannot be known whether the operation will accomplish the result desired. The record abundantly establishes within reasonable certainty that future pain and suffering will be experienced by appellee. This is all the law requires. Borcherding v. Eklund, 156 Neb. 196, 55 N. W. 2d 643. The contention of appellant that the trial court was wrong in permitting the jury to consider future pain and suffering by appellee in fixing the damages in this case has no support in the record.

The failure of the district court to include in the charge to the jury the subject matter stated in request No. 12 made by appellant concerning the care required of the operator of a motor vehicle on the wrong side of a road has no significance since the jury found that Embree was not operating his automobile on the wrong side of the highway at the time of the accident. This is implicit in the verdict of the jury.

The judgment should be and it is affirmed.

AFFIRMED.

EMIL H. MUELLER ET AL., APPELLANTS, V. EUGENE P. KEELEY, APPELLEE.

80 N. W. 2d 707

Filed January 25, 1957. No. 34053.

1. **Judges.** The judges of the several district courts, as such, have no inherent authority at chambers whatever, but only such as the statutes give to them.
2. **Courts.** When the court attempts to render a judgment at a place other than where it is authorized to hold court, it has no jurisdiction, and its acts possess no validity.
3. **Statutes.** Statutes pertaining to the same subject matter should be construed together, and this is particularly true if the statutes were passed at the same session of the Legislature.
4. **Judgments: New Trial.** An order of the trial court overruling or sustaining a motion for a new trial must be made with the same solemnity as a judgment. It is the order which gives finality to the judgment. It goes to the determination of a substantial right of the party.
5. **Appeal and Error.** Where the record in a law action shows the filing of a motion for a new trial, but no ruling thereon by the trial court, the appeal will be dismissed as prematurely taken.

APPEAL from the district court for Cherry County: EARL L. MEYER, JUDGE. *Appeal dismissed.*

Charles A. Fisher and *Dean L. Donoho,* for appellants.

William B. Quigley and *Davis, Healey, Davies & Wilson,* for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

SIMMONS, C. J.

In this action plaintiffs by amended petition sought a money judgment against defendant. Defendant by answer denied liability and prayed for a judgment of dismissal. By reply plaintiffs renewed their prayer for a money judgment. The cause was tried to the court, a jury being waived, on June 13 and 14, 1955.

The transcript shows "Findings and Judgment" filed

on December 19, 1955. However, it recites that these findings and judgment were made on December 3, 1955. Plaintiffs filed a motion for a new trial on December 10, 1955.

The transcript then contains what appears to be a copy of a letter dated March 27, 1956, written from the office of the trial judge at Alliance, Nebraska. It is directed to the attorneys of record "In Re: Mueller v. Keeley." Two paragraphs refer to the motion for a new trial and discuss the views of the trial court in answer to contentions of the plaintiffs. It concludes: "The motion for new trial is overruled." The letter begins with the salutation "Gentlemen," and ends with "Yours very truly" and the signature of the judge. It bears a "Received & Filed" endorsement of the clerk of the district court dated March 29, 1956.

Plaintiffs treat this letter as a final order overruling their motion for a new trial. Their appeal is based thereon.

Plaintiffs assign errors directed at the judgment for the defendant.

On our own motion we raise the sufficiency of the record to show a final order of the trial court overruling the motion for a new trial. We find it insufficient as a matter of law. We dismiss the appeal as premature.

The Constitution of Nebraska provides: "The several judges of the courts of record shall have such jurisdiction at chambers as may be provided by law." Art. V, § 23.

As early as Ellis v. Karl, 7 Neb. 381, construing this provision we held: "The judges of the several district courts, as such, have no inherent authority at chambers whatever, but only such as the statutes give to them."

That holding was followed in Browne v. Edwards & McCullough Lumber Co., 44 Neb. 361, 62 N. W. 1070. It was followed again in Hodgin v. Whitcomb, 51 Neb. 617, 71 N. W. 314, wherein we held: "He can exercise such authority alone as is given by the legis-

lature." We there reviewed the statutes as to the powers of judges at chambers and held: "We are unable to find any legislative enactment in this state which authorizes a judge of the district court to pass upon a motion for a new trial, or to render a money judgment, when the court is not in actual session for the transaction of business." This decision was cited and followed in Gamble v. Buffalo County, 57 Neb. 163, 77 N. W. 341.

In Kime v. Fenner, 54 Neb. 476, 74 N. W. 869, we held: "A judge at chambers possesses no jurisdiction to vacate orders or judgments of the district court." The decision in Ellis v. Karl, *supra,* was again followed in Johnson v. Bouton, 56 Neb. 626, 77 N. W. 57.

It necessarily follows that jurisdiction to enter the order here involved at chambers must be found in the statutes.

In Shold v. Van Treeck, 82 Neb. 99, 117 N. W. 113, we reviewed the statutes then existing to determine what business the judge could transact at chambers and held: "The law of this state has fixed the place where the court shall be held. It determined what business may be transacted at chambers, and this court cannot change the law, and has no power to change the time or place at which the court may be held. The district court possesses jurisdiction only so long as it is holding court in conformity with the law; and when, without excuse, it disregards the law and attempts to hold court in any other place than that prescribed by statute, its acts become coram non judice. When the court attempts to render a judgment at a place other than where it is authorized to hold court, it has no jurisdiction, and its acts possess no validity."

We followed this holding in In re Estates of Anderson, 149 Neb. 551, 31 N. W. 2d 562.

Prior to 1935 the statute provided in part: "All terms of the district court shall be held at the county seat in the court house, or other place provided by the county board." § 27-303, Comp. St. 1929. That provision was

amended in 1935 so as to provide in part: "All terms of the district court shall be held at the county seat in the court house, or other place provided by the county board, but nothing herein contained shall preclude the district court, or a judge thereof, from rendering a judgment or other final order or from directing the entry thereof in any cause, in any county other than where such cause is pending, where the trial or hearing upon which such judgment or other final order is rendered took place in the county in which such cause is pending." Laws 1935, c. 58, § 1, p. 213. This amendment was approved February 19, 1935, and is now section 24-303, R. R. S. 1943.

This amendment must be considered in the light of Laws 1935, c. 42, § 1, p. 161, now section 25-1329, R. R. S. 1943, which provides: "That in any matter submitted to and taken under advisement by the District Court, or a judge thereof, such court or judge shall give the attorneys for the respective parties at least five days notice in writing sent by United States mail and addressed to their last known place of business, if such place of business be known to such court or judge, of the time and place when judgment or other final order will be entered in such matter, and may transmit any such judgment or final order, together with any findings of fact and conclusions of law that may be made, in writing, to the clerk of the court where such matter is pending from any place within this state, to be entered by such clerk at the time provided in such notice; and a statement in the judgment or final order that such notice was given shall be presumptive evidence thereof. Such judgment or final order, when entered by the clerk, shall for all purposes be deemed to have been made and entered in the county where such matter is pending."

The above act was introduced by the same member of the Legislature and approved the same day as section 24-303, R. R. S. 1943.

The applicable rule is: "Statutes pertaining to the same subject-matter should be construed together, and this is particularly true if the statutes were passed at the same session of the legislature." Nebraska District of Evangelical Lutheran Synod v. McKelvie, 104 Neb. 93, 175 N. W. 531, 7 A. L. R. 1688.

It is obvious that Laws 1935, c. 42, § 1, p. 161, now section 25-1329, R. R. S. 1943, was enacted as a grant of power to the district courts to be exercised within and subject to its terms, and that Laws 1935, c. 58, § 1, p. 213, now section 24-303, R. R. S. 1943, was enacted to remove any statutory impediment to the powers granted in section 25-1329, R. R. S. 1943.

The letter here in record cannot be held to be a compliance with section 25-1329, R. R. S. 1943, so as to entitle it to be deemed made and entered in the county where this matter is pending.

This situation does not go to a procedural irregularity but to the power of the court and the legality of the order.

An order of the trial court overruling or sustaining a motion for a new trial must be made with the same solemnity as a judgment. It is the order which gives finality to the judgment. It goes to the determination of a substantial right of the party.

An order granting or denying a new trial is an appealable order. § 25-1315.03, R. R. S. 1943. The time within which a notice of appeal must be filed is limited to 1 month from the overruling of a motion for a new trial. § 25-1912, R. R. S. 1943. Our decisions show that right of appeal may be lost if the above act is not complied with as to time. See Powell v. Van Donselaar, 160 Neb. 21, 68 N. W. 2d 894. The beginning of the 1-month period must be a fixed date in order to calculate the date of expiration. If this letter were to be held a final order, then the questions could well arise: Did the 1-month period begin to run when the judge wrote the letter, or when the clerk of the court received and

filed it, or when the attorneys received it? Obviously the "time" of the entry of the order becomes important. Just as obviously the parties are entitled to "at least five days notice" of the time and place when the judgment is to be entered.

Here no attention was given to the 5-day notice provision, for the letter was written March 27, 1956, and received and filed by the clerk of the court on March 29, 1956.

Section 25-1318, R. R. S. 1943, provides: "All judgments and orders must be entered on the journal of the court, and specify clearly the relief granted or order made in the action."

Here no such order was entered. The appellants resorted to a notice of appeal "from the order of the District Court announced in letter to the parties on March 27th, 1956 overruling the motion for new trial * * *."

Section 24-317, R. R. S. 1943, grants power to district judges in chambers. The powers enumerated in paragraph (1) are conditioned upon 10 days' notice or written stipulation. The powers granted in paragraph (2) are conditioned upon written stipulation. The powers granted in paragraph (3) are limited to ex parte orders. This section has no application here.

There are other provisions of the statutes concerning powers of the judge at chambers which we have examined. They are sections 8-191 and 30-1106, R. R. S. 1943, and 48-184, R. S. Supp., 1955. They relate to special circumstances in nowise involved here.

The letter of March 27, 1956, filed March 29, 1956, does not constitute a final order overruling the motion for a new trial. Of necessity, then, the motion for a new trial is still pending.

It is the established rule that where the record in a law action shows the filing of a motion for a new trial, but no ruling thereon by the trial court, the appeal will be dismissed as prematurely taken. See, Metzger v.

Royal Neighbors of America, 85 Neb. 477, 123 N. W. 1052; Cozad Ditch Co. v. Central Nebraska P. P. & I. Dist., 132 Neb. 547, 272 N. W. 560.

The appeal is accordingly dismissed.

DISMISSED.

IN RE APPLICATION OF DONALD DALE COTNER FOR A WRIT OF HABEAS CORPUS.

DONALD DALE COTNER, APPELLANT, V. THOMAS S. SOLOMON, SHERIFF OF CASS COUNTY, NEBRASKA, APPELLEE.

80 N. W. 2d 587

Filed January 25, 1957. No. 34059.

1. **Habeas Corpus.** The sufficiency of evidence adduced at a preliminary examination to hold an accused to answer for a crime with which he is charged may be raised and tried in habeas corpus proceedings.
2. ———. In a habeas corpus proceeding instituted for the purpose of testing the sufficiency of evidence taken at a preliminary examination to require a person to be tried on a criminal charge, the court will not weigh the evidence but will only inquire as to the existence of evidence to sustain the charge.
3. **Criminal Law: Evidence.** While a voluntary confession is insufficient, standing alone, to prove that a crime has been committed, it is, nevertheless, competent evidence of that fact, and may, with slight corroborative circumstances, establish the corpus delicti as well as the defendant's guilty participation.

APPEAL from the district court for Cass County: JOHN M. DIERKS, JUDGE. *Affirmed.*

Tesar & Tesar and *Walter H. Smith*, for appellant.

James F. Begley, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CHAPPELL, J.

In a complaint filed in the county court of Cass County, defendant was charged with the crime of indecent

fondling of a minor. In that connection, the alleged offense is defined by section 28-929(2), R. R. S. 1943. The offense allegedly occurred on August 24, 1955, and involved one named minor girl 5 years old, and one named minor girl 6 years old. They were sisters. Pursuant to the complaint, defendant was arrested and pleaded not guilty. Thereafter he was accorded a preliminary hearing whereat the county court having jurisdiction found "that a crime has been committed and that there is a possibility that the crime may have been committed by the defendant." Defendant was then ordered bound over to the district court for trial, with the amount of his bond continued at $1,000.

Subsequently defendant, as relator, sought release and discharge from custody of respondent, Thomas S. Solomon, the sheriff of Cass County, by a habeas corpus action filed in the district court upon the alleged ground that there was no competent and sufficient evidence adduced at the preliminary hearing that a crime had been committed or that there was probable cause to believe that defendant committed the alleged offense. At the hearing upon the merits of the habeas corpus action a full and complete transcript of the proceedings had and evidence adduced at defendant's preliminary hearing, including a voluntary statement made by him to the sheriff at about 9 p. m., August 24, 1955, was offered by relator and received in evidence by stipulation. Thereupon the trial court denied the writ and refused to release and discharge relator, who for clarity will be hereinafter called defendant. Thereafter his motion for new trial was overruled and defendant appealed to this court, assigning in substance that the trial court erred in finding that the evidence adduced at the preliminary hearing was sufficient to hold accused for trial in the district court, and erred in failing to release and discharge him from custody pursuant to his request for a writ of habeas corpus. We conclude that the assignment should not be sustained.

At the beginning of the preliminary hearing witnesses for the State, except the sheriff, were segregated at request of defendant, who offered no testimony in his own behalf. The first witness called by the State was one of the minor girls alleged to have been fondled and massaged in an indecent manner by defendant. However, after vigorous examination by counsel for defendant to test her competency as a witness, she became confused and frightened, and sobbingly refused to tell the truth, so she was withdrawn as a witness.

The other minor girl alleged to have been fondled and massaged in an indecent manner by defendant was then called as a witness by the State. She gave her name, together with the names of her father and mother. She said that she was 5 years old and attended kindergarten school, First Ward, and the Baptist Sunday School. She testified at length with regard to her knowledge of the truth and the consequences of untruth. Despite vigorous examination by counsel for defendant to test her competency as a witness, she finally qualified, and over objections of defendant's counsel, she was duly sworn as a witness. As such she identified defendant as Donald Cotner who drives the bus which was kept in defendant's garage close to their house in Plattsmouth. She testified that she and her little brother got in defendant's bus outside of his garage and rode into the garage while defendant was driving it. As soon as the bus got in the garage her brother got out of it but she stayed in for a little while. She did not know what defendant did to her, but he tickled her once. However, she would not tell where on her body defendant had tickled her because she was afraid a cop, "I mean the sheriff," whom she had previously identified, might pick her up, and "I wouldn't dare say it * * * Because I just wouldn't dare * * * Because I just don't want to."

The State then called the sheriff as a witness. He testified that in the course of his duties as sheriff he made an investigation with reference to an incident between

defendant and the minor girls involved, which occurred in defendant's garage. The sheriff was notified of it about 6 p. m., August 24, 1955, by oral complaint over the phone from the residence of the girls' parents, who lived in the second house west of defendant's garage. However, the sheriff was then otherwise engaged and could not respond to such call until between 6:30 and 7 p. m. He then had a discussion or conversation in defendant's garage with defendant and another man whose little 3-year-old girl had been indirectly involved in the incident. Thereafter the sheriff told such other man to come to the sheriff's office and bring his wife and child with him. The sheriff then took defendant to the county jail. After talking with such persons in his office, the sheriff had defendant come to his office. Defendant was then questioned with regard to the incident between him and the two minor girls. There, at about 9 p. m. on August 24, 1955, without any threats or promises having been made against or to defendant, and after defendant had been fully advised of his constitutional rights, he voluntarily made and signed a 2-page typewritten question and answer statement in the presence of the sheriff and deputy sheriff as witnesses thereto.

Prior to making the statement the sheriff, defendant's father, and defendant had a conversation on the staircase of the jail whereat defendant admitted that he had fondled the two girls involved in an indecent manner, and expressed a desire to make a statement about the incident. Defendant's father then began to cry and walked over to his car, whereupon the sheriff and defendant went to the sheriff's office where the typewritten statement was voluntarily made by defendant. It was offered by the State and received in evidence at the preliminary hearing.

It would serve no purpose to recite herein the salacious and revolting details of defendant's statement. It is sufficient for us to say that therein he voluntarily admitted that he had deliberately committed the offense

as charged in the complaint; furthermore, he also admitted that he had committed a like offense upon one of the little girls upon an occasion other than that charged in the complaint.

In the light of the foregoing evidence and authorities hereinafter cited and discussed, we conclude that the trial court did not err in refusing to release and discharge defendant.

Among other authorities, defendant cited and relied upon People v. White, 276 Mich. 29, 267 N. W. 777, wherein the court said: "It appears to be well settled that the corpus delicti cannot alone be established by the extrajudicial confession of an accused. If the admissions, which were in the nature of confessions, be eliminated from the testimony taken by the examining magistrate, that which remains is not sufficient to establish probable cause that the crime * * * has been committed by anyone. Aside from the confessions, there was not sufficient testimony in the examination to connect defendants with the offenses charged in the warrant." In that connection, defendant argued here that there was no competent evidence adduced at defendant's preliminary hearing to prove corpus delicti except the admissions of defendant. We do not agree with that contention.

In Birdsley v. Kelley, 159 Neb. 74, 65 N. W. 2d 328, we held that: "The sufficiency of evidence adduced at a preliminary examination to hold an accused to answer for a crime with which he is charged may be raised and tried in habeas corpus proceedings.

"In a habeas corpus proceeding instituted for the purpose of testing the sufficiency of evidence taken at a preliminary examination to require a person to be tried on a criminal charge, the court will not weigh the evidence but will only inquire as to the existence of evidence to sustain the charge."

In Gallegos v. State, 152 Neb. 831, 43 N. W. 2d 1, in dealing with a trial on the merits in the district court,

we held: "While a voluntary confession is insufficient, standing alone, to prove that a crime has been committed, it is, nevertheless, competent evidence of that fact, and may, with slight corroborative circumstances, establish the corpus delicti as well as the defendant's guilty participation." In that opinion we quoted with approval the following from Limmerick v. State, 120 Neb. 558, 234 N. W. 98: "'The rule that the corpus delicti cannot be proved by the confession of the defendant is true as a general proposition, yet confessions or admissions may be considered in connection with the other evidence to establish the corpus delicti. It is not necessary to prove the corpus delicti by evidence entirely independent and exclusive of the confession or admissions. Groover v. State, 82 Fla. 427; 26 A. L. R. 380; 17 R. C. L. 64, sec. 69.'" Thereafter, citing Egbert v. State, 113 Neb. 790, 205 N. W. 252, Whomble v. State, 143 Neb. 667, 10 N. W. 2d 627, and Clark v. State, 151 Neb. 348, 37 N. W. 2d 601, we said: "This principle has often been reaffirmed by this court."

As early as In re Application of Balcom, 12 Neb. 316, 11 N. W. 312, this court said: "A writ of habeas corpus is not a proceeding to correct errors, and where it appears that the court whose action is sought to be reviewed had jurisdiction; that an offense has been committed, and there is testimony tending to show that the accused committed the offense, this court in this proceeding will not weigh evidence to see whether it is sufficient to hold the accused."

Such case was cited with approval in Jahnke v. State, 68 Neb. 154, 94 N. W. 158, wherein this court said: "It is the rule in this jurisdiction that while the question of the sufficiency of the evidence introduced at a preliminary examination to hold an accused to answer for a crime with which he is charged may be raised and tried in habeas corpus proceedings, yet where it appears that the court had jurisdiction, that an offense had been committed, and there is testimony tending to

show that the accused committed the offense, the court will not weigh the evidence further to see whether it was sufficient to hold the accused on the ground of probable cause. It is not necessary in such cases that the evidence should be sufficient to support a verdict of guilty, or show guilt beyond a reasonable doubt." Rehearing was granted in that case at 68 Neb. 181, 104 N. W. 154, whereat the judgment on the merits after defendant was found guilty by a jury was reversed, but that part of the original opinion relating to preliminary hearing was not disturbed. Both such last-cited cases were cited with approval in State ex rel. Flippin v. Sievers, 102 Neb. 611, 168 N. W. 99, which reaffirmed in principle the rule heretofore quoted therefrom.

In Lingo v. Hann, 161 Neb. 67, 71 N. W. 2d 716, we said: " 'A preliminary hearing before a magistrate is not a criminal prosecution or trial within the meaning of section 11, art. 1 of our Constitution.' Roberts v. State, 145 Neb. 658, 17 N. W. 2d 666.

"The functional purpose of the preliminary hearing is stated in section 29-506, R. R. S. 1943, as follows: 'If upon the whole examination * * * it shall appear that an offense has been committed and there is probable cause to believe that the person charged has committed the offense, the accused shall be committed to the jail of the county in which the same is to be tried, there to remain until he is discharged by due course of law; * * *.'

" 'It is in no sense a trial of the person accused. Its purpose is to ascertain whether or not a crime has been committed, and whether or not there is probable cause to believe the accused committed it.' Roberts v. State, *supra.*

"The effect of the foregoing, if found to exist, is to hold the accused for trial in the district court, which has jurisdiction to try him. See Dobrusky v. State,

140 Neb. 360, 299 N. W. 539." That is what the county court of Cass County did.

In that connection, defendant also argued that the county court did not find that there was probable cause to believe that defendant committed the offense as required by section 29-506, R. R. S. 1943, but rather erroneously found that there was a "possibility" that defendant committed it. Defendant's contention has no merit.

In Carson v. State, 80 Neb. 619, 114 N. W. 938, after citing authorities, this court said: "It is true that before an accused can be legally held to answer a criminal charge upon information he is entitled to a preliminary examination, and there must be proof and a judicial determination that an offense has been committed and that there was probable cause to believe the defendant guilty as charged in the complaint. But that does not conclusively argue that it is necessary, in the absence of a statute requiring it, that these findings should be entered, technically, or at all, upon the docket. Jurisdiction having been obtained, the preliminary examination had, and the accused recognized to the district court would probably be enough to be shown by the record to confer jurisdiction upon the prosecuting attorney to file the information and upon the district court to try the accused." That statement is controlling under the comparable circumstances and record presented in the case at bar.

In the light of the evidence heretofore set forth and authorities cited herein, we conclude that the judgment of the trial court should be and it hereby is affirmed.

AFFIRMED.

SIMMONS, C. J., dissenting.

I dissent. It is a serious matter when we determine debatable questions of fact insofar as they relate to an individual person. It is also a serious matter when in the process, we determine rules of law that hereafter will apply to all persons accused of an offense

against the laws of this state where a preliminary hearing is a prerequisite. Section 29-506, R. R. S. 1943, provides that if it shall appear that no offense has been committed *or* that there is no *probable* cause for holding the accused "he shall be discharged." That condition is in the alternative. The statute further provides that if it appears that an offense has been committed *and* that there is probable cause to believe that the person charged has committed the offense then the accused shall be committed. That condition is in the conjunctive.

Here the examining magistrate found that an offense had been committed and that there was a "possibility" that the defendant had committed it.

Here this court examines the record and finds that there is evidence of probable cause. We have from the beginning to as late as Lingo v. Hann, 161 Neb. 67, 71 N. W. 2d 716, sustained the proposition that the purpose of the preliminary hearing is to ascertain whether or not a crime has been committed and whether or not there is probable cause to believe the accused committed it.

That duty the law places upon the examining magistrate. Here the examining magistrate found only that there was a *possibility* that the accused committed the offense. Obviously he refused to find probable cause. The law clearly requires that finding as to a condition to a commitment—otherwise "he shall be discharged."

Carson v. State, 80 Neb. 619, 114 N. W. 938, relied on by the court, does not sustain the holding made here. In that case there was no finding that an offense had been committed. There was a finding of probable cause. We held there that there must be "*a judicial determination* that an offense had been committed and that there was probable cause to believe the defendant" had committed the offense. The Attorney General in the Carson case argued that the finding of probable cause had implicit in it a finding that an offense had been com-

mitted. But from that it does not follow that a finding that an offense has been committed has implicit in it a finding of probable cause that the defendant committed it. So fact-wise, that case is not controlling here. The most that that case holds is that "these findings" need not be entered upon the docket. Here an essential finding to hold the accused was not made, and that fact appears affirmatively from the record. In the absence of a "judicial determination" of probable cause and the presence of a finding of only possible cause, I would hold that the examining magistrate was without power to commit the accused for trial. Stated in the language of the statute, he should be discharged. Such is the mandate of the statute.

WESLEY HARMS PEERY, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

80 N. W. 2d 699

Filed January 25, 1957. No. 34062.

1. **Rape.** In a prosecution for rape, after the prosecutrix has testified to the commission of the offense, it is competent to prove in corroboration of her testimony as to the main fact that within a reasonable time after the alleged outrage she made complaint to a person to whom a statement of such an occurrence would naturally be made.
2. ———. The testimony concerning such complaint should, on direct examination, be confined to the fact that complaint was made, and the details of the event, including the identity of the person accused, are not proper subjects of inquiry unless the complaint was a spontaneous, unpremeditated statement so closely connected with the act as to be part of the res gestae.
3. ———. The court in a trial for rape should not inform the jury that such complaint is a corroborating circumstance but the jury should be permitted to give it such consideration and effect in that regard as it decides is proper in the circumstances of the case.
4. ———. If the law requires corroboration of a witness, it must be accomplished by other evidence than that of the witness

himself. His acts or statements do not constitute corroborative evidence.

5. ———. In a prosecution for rape, if the prosecutrix testifies to the facts constituting the crime and the accused unequivocally denies the commission of the offense, the testimony of the prosecutrix must be corroborated on material points by other evidence to justify or sustain a conviction of the accused.

6. ———. It is not essential in such a case that the prosecutrix be corroborated by other evidence as to the principal act constituting the offense but it is indispensable that she be corroborated as to material facts and circumstances which tend to support her testimony as to the principal fact in issue.

ERROR to the district court for Sarpy County: JOHN M. DIERKS, JUDGE. *Reversed and remanded.*

John R. Doyle and *John E. Wenstrand,* for plaintiff in error.

Clarence S. Beck, Attorney General, and *Richard H. Williams,* for defendant in error.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

BOSLAUGH, J.

Plaintiff in error, designated herein the accused, was convicted of the crime of rape charged to have been committed on the 21st day of January 1956, upon Mary Billingsley, referred to herein as prosecutrix, forcibly and against her will.

The circumstances of the offense as related on the trial by the prosecutrix include the following:

She traveled by automobile on January 21, 1956, about 11:45 a. m., on U. S. Highway No. 6 when she came to the intersection of it with Highway No. 31 north of the town of Gretna. She turned into the latter and was overtaken and stopped by the accused who was operating an automobile which passed her from the rear and was driven on an angle to the right in front of the car of the prosecutrix in such a manner as to prevent her from going forward. Her car was partly off the

highway when it was stopped. There was no other traffic in view at that place. The accused approached the prosecutrix as she sat in her car with a gun in his hand which he pointed at her and commanded that she quickly get out of her car and come with him. She obeyed, went to his automobile, and got into the front seat of it. He refused her permission to remove her car entirely onto the shoulder of the road. He drove his car back onto Highway No. 6 and then went south, east, and north, in that order, a distance of probably 6 or 7 miles. He stopped on a north-and-south graveled road. She had never seen him before. There was no conversation except accused asked her if she was going to Council Bluffs and she said she was. She asked permission to smoke a cigarette and to remove her coat. He consented; but when she was about to get a match from her purse, he stopped her and required that she use his lighter. After the accused had stopped on the north-and-south highway he removed his topcoat and while he held the gun on prosecutrix he said to her that he was warning her if she resisted him he would kill her. He ordered her to go over the front seat into the back seat of the car and remove a specified part of her clothing. He got in the back seat and asked if she was frightened. She said that she would not fight, that she did not want him to kill her, and that she would feel much better if he put the gun down. He placed it in the front seat. He exacted and secured from her the intimate indulgence he sought. He had held the gun in his hand with its barrel pointed toward her continuously from the time she first saw him until he placed it in the front seat at the time he compelled her to submit to his demands. She did not physically oppose him because he had told her that he would kill her if she did and she believed he had the means in his control to execute the threat he made to her.

She returned to the front seat as he directed and he then demanded money from her. He took her billfold

but returned it when he found it contained only a nominal amount. He expressed disappointment and resentment because she did not have more money. An automobile traveling north passed the car of the accused while it was stopped at the place where prosecutrix was attacked. She did not describe it. The accused drove north on the graveled road an estimated distance of something like 200 yards to a farmstead where there was a mail box near the side of the road. It was not visible from where they had been parked. The prosecutrix saw the car that had passed them near the mail box. A pick-up truck drove out of the farmyard near the mail box. In it were a driver and one other person. There were gas drums or containers visible in the box of the truck. There were persons in the automobile and near the mail box. The accused and prosecutrix passed there about 12:15 p. m. The accused continued to drive north on the north-south road to the first intersection, turned west, and went back to Highway No. 6. He stopped on the road which extended to Highway No. 6 and demanded the name and address of the prosecutrix. She showed him her driver's license. He said he wanted these so that if she told anyone about what had happened, "I'll come across the bridge." Accused returned to where the car of prosecutrix was parked and let her out of his car with a warning that whatever she did she should not look back to see where he was going.

She completed her trip to Council Bluffs, went to the office where she was employed, called her employer, and reported to him the facts of her experience with the accused. Her employer went with her to a police station in Council Bluffs and she complained to a police officer concerning the assault made on her and she related the facts thereof. She went to the office of a doctor in that city about 5 p. m. that day and sought, secured, and submitted to an examination by the doctor.

The foregoing demonstrates that the prosecutrix tes-

tified to the commission of the offense by the accused and that she thereafter, as soon as the situation permitted when she was released from being a captive of the accused, made complaint of the alleged outrage to those to whom a statement of such an occurrence would naturally be made. She complained to her employer, Kenneth Hubler, and immediately thereafter in his presence at the police station in Council Bluffs she complained to Detective Jorgensen of the police force of that city in which she resided and worked. She says she told each of them of the experience she had had and what was done to her, gave a description of the man who she claimed assaulted her and a description of the automobile he was operating, and described to Detective Jorgensen the items and objects she observed in the automobile. There is absence of corroboration of the prosecutrix by either Kenneth Hubler or Detective Jorgensen because neither of them testified at the trial. It is not claimed that they were not available and no attempt to secure them as witnesses is exhibited by the record. The name of neither of them appears on the information. The State cannot escape the adverse effect of the failure to produce these persons and the information they had at the trial if, in fact, the complaints were made to them as the prosecutrix affirms. In such a situation it was the duty of the State to do so.

In Klawitter v. State, 76 Neb. 49, 107 N. W. 121, appears the following: "She (the person who claimed to have been debauched) testifies that when they came home from Melchers two of her brothers saw and talked with the defendant, that when she went to Melchers her sister left her with defendant and went home alone, that after the second act of intercourse she told Mrs. Gutch about it, yet none of these persons were called as witnesses to corroborate her statements. If this evidence was within reach it should have been produced."

It was competent in the circumstances of this case,

after the prosecutrix had testified to the commission of the offense, to prove in corroboration of her testimony as to the main fact that after the alleged outrage she made complaint concerning it to her employer and to the police officer. This doctrine is set forth in Krug v. State, 116 Neb. 185, 216 N. W. 664: "In a prosecution for rape, the prosecutrix may testify in chief, if within a reasonable time under all the circumstances after the act was committed she made complaint to another, to the fact and nature of the complaint, but not as to its details; and that other may likewise testify in chief to such fact and nature of the complaint, but not as to its details. Such testimony, together with all other facts and circumstances in evidence, may be considered by the jury in corroboration of the testimony of the prosecutrix as to the main fact in issue." See, also, Rhoades v. State, 102 Neb. 750, 169 N. W. 433; Henderson v. State, 85 Neb. 444, 123 N. W. 459, 26 L. R. A. N. S. 1149; State v. Meyers, 46 Neb. 152, 64 N. W. 697, 37 L. R. A. 423; Wood v. State, 46 Neb. 58, 64 N. W. 355. Evidence by another that such a complaint was made by prosecutrix may or may not be corroborative but the jury should be allowed to give it such consideration and effect as it decides is proper in the circumstances of the case. Henderson v. State, *supra.*

The testimony of the prosecutrix that she made complaint to her employer and to the police officer that she had been ravished does not constitute corroboration of her testimony as to the main fact of the alleged offense. The court observed in Fitzgerald v. State, 78 Neb. 1, 110 N. W. 676: "The prosecuting witness says that she was crying afterwards, and that the young lady who was with them observed it, but the young lady herself was not put upon the stand."

The doctor, Frederick E. Marsh, upon whom prosecutrix called late in the day of the assault, was a witness produced by the State. He was not asked to state whether or not the prosecutrix complained to him about

the alleged conduct of the accused towards her. He was asked to tell what examination he made of prosecutrix on January 21, 1956. His answer was an attempt to state that she had told him the history of her experience and that she stated she was not physically hurt in any way. There was an objection to anything the prosecutrix told the doctor. It was sustained by the court and all conversations between the doctor and her were excluded by the ruling of the court. The action of the court in this respect was improper. The doctor as a witness should, upon proper inquiry by the State, have been permitted to state the fact of any complaint prosecutrix made to him concerning the assault that she claimed was made on her that day. Krug v. State, *supra.* The internal examination made of her by the doctor revealed the presence of male fecundating fluid. He found no evidence that she had suffered any trauma, which he explained was bruising, scraping, scuffing, abrasion, or destruction of tissue. He stated he could not tell how long the fluid had been where he found it. The information the doctor gave was that the prosecutrix at some undetermined time probably had experienced intercourse and that she gave no evidence of any injury to her body. It was not corroborative of her claim that the accused had intercourse with her that day, much less that he had forced her to submit beyond her strength or power to resist. It is significant in this connection that the record, by the sworn statement of the prosecutrix, shows that on the preceding Thursday and Friday nights she stayed at the same place as a man she had come to Lincoln to visit and that she left that place Saturday morning at 11 o'clock January 21, 1956, for the trip to Council Bluffs, Iowa. There is no information that any other person was at the place where they stayed and there was no effort to eliminate the male friend of the prosecutrix from the implications of the testimony on that subject. The testimony of Dr. Marsh does not tend to connect the accused with the intercourse

any more than it tends to connect the male friend of the prosecutrix with it. It is also significant that there was no mention by the doctor of the prosecutrix exhibiting the indicia generally present when a female has been the victim of the offense charged in this case such as shock, hysteria, injury to her person, or torn, disarranged, or soiled clothing. The testimony of the doctor is not sufficient to furnish the corroboration necessary to support the verdict.

The prosecutrix said as they drove north on the north-and-south road from the place where she was attacked that they soon came to and passed a mail box and she saw the car there which she said had passed them when they were parked on that road. She did not attempt to describe it or state what view she had of it when it passed them. She said she saw a pick-up truck with "some sort of tank or container on the bed" drive out of the farmyard at that location. There were persons standing near the mail box. She fixed the time as about a quarter after 12 o'clock or "a little after noon." The accused continued to drive north to the first intersection, turned west, and proceeded to Highway No. 6. She did not tell of seeing any other automobile or vehicle after they had passed the mail box until they got back to where she had left her automobile at or near the intersection of Highway No. 6 and Highway No. 31 and near there she saw a car that appeared to be stuck in the ditch of one of the roads that connected with Highway No. 6. This was at least 3 miles west of the graveled road on which she claims she was ravished.

The State examined a farmer by the name of Biel. A north-and-south road was east of his farm. It had a rock surface. He had a mail box east of his house and a driveway from the highway into his farm. He went to the mail box to get his mail about 11 a. m., January 21, 1956, and a Mr. Alberry and a Mr. Smith came from the south in a Chevrolet car, stopped at the mail box, and asked Biel if he had seen any coyote tracks

in the snow that had fallen that morning. At that time a Mr. Boettcher and a Mr. Sawyer came there in a pick-up truck. They stopped and said they were hunting coyotes. There were some bottled gas tanks in the truck. These five men were near the mail box and talked for a few minutes. Three of them were witnesses in the case for the State and none of them said they saw any automobile traveling from south to north pass them on the highway. Biel testified there was no other vehicle in that area while the company of men was near the mail box and while they were conversing.

The occupants of the pick-up truck were Mr. Boettcher and Mr. Sawyer, who was the driver. The former said that they left Gretna at 10 o'clock the morning of January 21, 1956, and returned there at about 11:30 or 12 noon; that they stopped at the mail box when Alberry was there; that they stayed in the area a mile west of the Biel farm and "into that field off of that"; that he saw an older model tan Chrysler "that morning" with a Lancaster County number by which he meant he noticed "the prefix 'Two'"; "That is all I noticed"; that he did not observe whether there was anyone in the car; that he could not say the color of the license plate or for what year it was—1955 or 1956; that the car was about ⅓ of a block from him; that they were after "this coyote" and that was the reason he did not have a better recollection; and that he and Sawyer were crossing the road and he believed the car he saw was moving. He gave no more definite location of the car he claimed to have seen except it was on a road a mile west of Biel's. He did not say the direction it was facing or that it was traveling; neither did he state in what directions the road extended.

The version given by Sawyer was that he was at the mail box when Biel, Boettcher, and Alberry were there; that he drove around the section "west of Bernie Biel's"; that he saw a 1947 or 1948 model tan Chrysler after he had gone from the mail box "one mile west of Bernard's

farm" as he (Sawyer) was driving out of the field onto the road; that there were a man and woman in the front seat of the car; that he saw nothing else about the car; that he was within 15 to 25 feet of it; and that he did not see either the license plate or learn in what state it was registered. He did not say which directions the road extended on which the car was or the direction it was traveling. The automobile the accused was driving on the day of the alleged crime was positively identified as a 1949 model Chrysler.

The testimony of the three witnesses discussed above does not constitute corroboration of the prosecutrix.

The prosecutrix testified that on January 30, 1956, she, in Lincoln, identified the accused as the man who assaulted her; a 1949 model Chrysler automobile as the car operated by the accused at the time of the assault; and six articles in the automobile when she saw it on January 30, 1956, which she said she observed in the car when she was a captive of the accused on January 21, 1956. Her testimony furnished the foundation for their introduction as evidence at the trial except representation of the automobile was by picture which the prosecutrix identified. They were not otherwise connected with the accused or the commission of the offense. What the prosecutrix said or did with reference to any of these was not corroboration. She could not by her own act or statement corroborate herself. In Mott v. State, 83 Neb. 226, 119 N. W. 461, it is said: "As to the nature of the corroboration necessary to sustain a conviction in such cases, the authorities seem quite clear. Where the law requires the corroboration of a witness, it must be accomplished by other evidence than that of the witness himself. His own acts or statements do not constitute corroborative evidence. * * * Facts, whether main or collateral, must be established by competent testimony before they become of probative force in a lawsuit; and it is self-evident that the main fact in this case cannot be strengthened by a collateral

fact, the existence of which is dependent upon the same class of testimony." See, also, Lockman v. Fulton, 162 Neb. 439, 76 N. W. 2d 452; Hudson v. State, 97 Neb. 47, 149 N. W. 104; Boling v. State, 91 Neb. 599, 136 N. W. 1078; Annotation, 60 A. L. R. 1148; 44 Am. Jur., Rape, § 82, p. 952.

The law is firmly established in this state that in a prosecution for the crime of rape, if the prosecutrix testifies positively to the facts constituting the crime and the accused explicitly denies her statements, her testimony must be corroborated on material points by other evidence in order to justify or sustain a conviction. The testimony of the prosecutrix alone is not sufficient to warrant a conviction. Klawitter v. State, *supra;* Fitzgerald v. State, *supra;* Mott v. State, *supra;* Henderson v. State, *supra.* However, it is not essential that the prosecutrix be corroborated by other evidence as to the act constituting the offense. It is required that she be corroborated as to material facts and circumstances which tend to support her testimony as to the principal fact in issue. Cascio v. State, 147 Neb. 1075, 25 N. W. 2d 897; Medley v. State, 156 Neb. 25, 54 N. W. 2d 233; Linder v. State, 156 Neb. 504, 56 N. W. 2d 734. The prosecutrix testified to the commission by accused of the offense charged. The accused unequivocally denied the accusation made against him. The prosecutrix is not corroborated as to any material fact or circumstance which tends to support her testimony as to the principal fact of the crime. The conviction is not supported by the evidence. It is contrary to law and cannot be sustained.

The judgment should be and it is reversed and the cause is remanded to the district court for Sarpy County for further proceedings as provided by law.

REVERSED AND REMANDED.

WENKE, J., dissenting.

I disagree with the holding of the majority of the court to the effect that "The prosecutrix is not corrobo-

rated as to any material fact or circumstance which tends to support her testimony as to the principal fact of the crime"; that is, that the defendant in error, Wesley Harms Peery, whom we shall hereinafter refer to as the defendant, had sexual relations with her on January 21, 1956, forcibly and against her will. It should be understood, in this regard, that while it is required that the prosecutrix be corroborated as to material facts and circumstances which tend to support her testimony as to the principal fact in issue it is not essential that she be corrobarated by any evidence as to the act itself which constitutes the offense.

First, I wish briefly to discuss the inference left by the majority opinion that the State was duty bound to call prosecutrix's employer, Kenneth Hubler, and Detective Jorgensen of the Council Bluffs Police Department, to whom she had made complaint of the offense. I agree that if a situation here existed, as it did in Klawitter v. State, 76 Neb. 49, 107 N. W. 121, that there was no other evidence to corroborate that of the prosecutrix then the State would be required to do so in order to make a case for the jury. But even in such a situation, if the prosecutrix had complained to two or more people, the State would not be required to call all of them as their testimony would only be cumulative. However, if there is other competent evidence to meet the requirements of corroboration then I do not think the State is duty bound to call any of such witnesses, although it may properly do so if it desires. In my opinion the record here presents the latter situation.

Dr. Frederick E. Marsh, a licensed physician engaging in the general practice of medicine at 532 First Avenue in Council Bluffs, Iowa, examined prosecutrix about 5 p. m. on Saturday, January 21, 1956, the day on which the alleged crime was claimed to have been committed about noon. Prosecutrix told him the history of what had happened and he made a pelvic or internal examination. His examination revealed many sperma-

toza or secretion from the male of recent origin, although he would not pin point it as to time, stating it could be 3 or 4 hours one way or another. The majority opinion seems to completely discredit the effect of this testimony by the fact that prosecutrix had been visiting a male friend of hers in Lincoln on Thursday and Friday and stayed alone with him in his home and did not leave there until about 11 a. m. on January 21, 1956. While I think the latter was a fact for the jury to consider it is my opinion that the weight of this evidence was for the jury. It certainly corroborates the fact that someone had recently been intimate with the prosecutrix.

The State also produced witnesses Charles Boettcher and Ronald Sawyer of Gretna, Nebraska, who were hunting coyotes in a Chevrolet pick-up truck near the place in Sarpy County where the prosecutrix said the alleged offense occurred. They testified seeing an older, or 1947 or 1948, model tan Chrysler sedan in the area at about the time the prosecutrix claims they were there. One of them described the car bearing a Lancaster County license and having a man as the driver and a woman as a passenger in the front seat. Prosecutrix, from her slight general knowledge thereof, described the car used by the party committing the act as a cream colored or tan 1947 or 1948 model 4-door Chrysler sedan. Defendant Peery admits that on January 21, 1956, he owned and was driving a 1949 model tan 4-door Chrysler sedan with a Lancaster County license plate. The evidence does not show there is any difference in the appearance of the 1947, 1948, or 1949 model 4-door Chrysler sedans. I think this evidence corroborates the prosecutrix's story.

Prosecutrix testified she observed certain things in the car she was forced to ride in with the defendant from the place where he forced her to leave her own car at the point of a gun to the place where the alleged crime was committed, and then back to her car. That

same day, after she had returned to Council Bluffs, prosecutrix, when she complained thereof to Detective Jorgensen of the Council Bluffs police, gave him a description of the car used by the party perpetrating the alleged crime and described to him the contents thereof. Later, on January 30, 1956, when defendant was apprehended in Lincoln, Nebraska, the car he was then using was identified by the prosecutrix as the one used by the party committing the alleged offense on January 21, 1956, and that defendant was that party. Taken from this car were two maps, a small suitcase, a white painter's cap, and a pink quilt, all of which the prosecutrix identified as being in the car used by defendant on January 21, 1956, plus the gun which was found therein under the front seat and which prosecutrix identified as the one defendant had used to force her to submit. Not only did the police officers of the City of Lincoln identify all of these articles as taken from defendant's car *but defendant himself admits the pink quilt,* sometimes referred to as a blanket or comforter, *the painter's cap, and suitcase were in his car on both Saturday, January 21, 1956, the day the alleged crime was committed,* and on Monday, January 30, 1956, the day he was taken into custody by the Lincoln police. Certainly this corroborates the prosecutrix's story in every way.

I have read and reread this record and it is difficult for me to conceive a stronger case of corroboration could be made than here presented unless the State was fortunate enough to have eyewitnesses to the act, something not required by the laws of this state.

CHAPPELL, J., concurs in this dissent.

ROSE VASA, APPELLANT, V. JOE VASA, APPELLEE.
80 N. W. 2d 696

Filed February 1, 1957. No. 34039.

Constitutional Law: Judges. Under the Constitution judges of the district courts, as such, have no inherent judicial authority at chambers and possess only such authority or jurisdiction thereat as is conferred on them by statute.

APPEAL from the district court for Cheyenne County: ISAAC J. NISLEY, JUDGE. *Appeal dismissed.*

Mothersead, Wright & Simmons and *Robert M. Harris,* for appellant.

Firmin Q. Feltz, for appellee.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

WENKE, J.

This is an appeal from the district court for Cheyenne County. While the appeal relates primarily to a decree rendered on January 6, 1956, in a divorce proceeding pending in that court, we take notice of the fact that the record affirmatively shows a defect as it relates to our jurisdiction on appeal.

After the decree was rendered on January 6, 1956, the record shows that on January 12, 1956, Rose Vasa, plaintiff below and appellant here, filed a motion for a new trial. After this motion for a new trial had purportedly been overruled by the trial judge she filed a notice of appeal, doing so on March 26, 1956. The cause was then docketed in this court on March 29, 1956, as case No. 34031. Apparently becoming aware of the fact that her appeal was out of time, as the transcript here filed showed the ruling on the motion for new trial to have been made on January 30, 1956, appellant dismissed her appeal without prejudice. See, § 25-1912, R. R. S. 1943; Mueller v. Keeley, *ante* p. 613, 80 N. W. 2d 707.

Thereafter appellant filed the following motion in this cause in the district court for Cheyenne County: "COMES NOW Rose Vasa, Plaintiff herein, and moves the Court to set aside the Order of the Court heretofore filed, purporting to overrule the Motion for a new trial, said Order purportedly being dated January 30, 1956, but actually having been signed in Lincoln County, Nebraska, on the 21st day of March, 1956, without notice and to set argument on the Motion for a new trial and other Motions down before the Court at its earliest convenient opportunity."

Hearing was had on this motion at Sidney, Nebraska, on April 4, 1956. The trial judge, who rendered the decree on January 6, 1956, testified at this hearing that he received the journal entry purportedly overruling the motion for new trial through the mail at chambers in North Platte, Lincoln County, Nebraska, from appellant's counsel with the following letter: "Enclosed herewith is a Journal Entry and copy in the Vasa matter. I assume that you will have no objection to overruling without Mr. Feltz or my being present so that we can get this matter appealed to the Supreme Court. I would appreciate it if you would return the order to me immediately and I will see to it that it is filed and docketed in Sidney."

The hearing record shows, as stated by counsel for Joe Vasa, defendant below and appellee here, that neither he nor his client was ever notified of the fact that the motion for new trial was being submitted, nor had they, or either of them, consented or agreed to the entry of any order thereon.

The trial judge further testified that no previous hearing had ever been held on the motion for new trial; that he signed the journal entry enclosed at his chambers in North Platte, Lincoln County, Nebraska, on or about March 21, 1956, without changing the date therein of January 30, 1956; and that thereafter he mailed it at North Platte addressed to appellant's counsel at

Scottsbluff, Nebraska. The record shows the latter thereafter filed it in the office of the clerk of the district court for Cheyenne County on March 23, 1956.

It is apparent, from his order overruling the motion being heard, that the trial judge was of the opinion the order he had signed on or about March 21, 1956, was a valid order. The order is as follows:

"At a session of the District Court in and for Cheyenne County, Nebraska, this 4th day of April, 1956.

"Comes now the respective parties. The Defendant on motion of his attorney waives notice of hearing on the motion for a new trial that was already submitted in Lincoln County, Nebraska, on March 21st, 1956.

"Said cause now comes on for hearing on the motion to set aside the order of the Court entered on the 21st day of March, 1956, in Lincoln County, Nebraska. The same is argued to the Court and is submitted to the Court on the pleadings and the evidence.

"Find that the same should be overruled on the ground that the matter was exparte and done within the district.

"Find that the order as entered and requested by Robert G. Simmons, Jr. was entered on the 21st day of March, 1956 though the order as presented to the Court and requested to be signed by said Simmons was dated January 30, 1956.

"IT IS THEREFORE ORDERED ADJUDGED AND DECREED BY THE COURT that said motion be and the same is hereby overruled, to which rulings of the Court Robert G. Simmons, Jr. excepts."

Appeal was taken from the foregoing ruling by appellant on April 7, 1956. We have recently, in the case of Mueller v. Keeley, *supra,* dealt with and fully discussed the question of a trial judge's jurisdiction at chambers on motions for new trial; when he can rule on such motions thereat; what is necessary to give him jurisdiction to do so; and the legal effect of a failure to comply therewith. What is therein said is herein controlling for the factual situations are comparable.

However, we shall again briefly discuss the principles here applicable.

Under the Constitution judges of the district courts, as such, have no inherent judicial authority at chambers and possess only such authority or jurisdiction thereat as is conferred on them by statute. Art. V, § 23, Constitution of Nebraska. See, also, Ellis v. Karl, 7 Neb. 381; Fisk v. Thorp, 51 Neb. 1, 70 N. W. 498; Hodgin v. Whitcomb, 51 Neb. 617, 71 N. W. 314; Kime v. Fenner, 54 Neb. 476, 74 N. W. 869; Johnson v. Bouton, 56 Neb. 626, 77 N. W. 57; Morrill County v. Bliss, 125 Neb. 97, 249 N. W. 98, 89 A. L. R. 932; Mueller v. Keeley, *supra.*

This situation does not go to a procedural irregularity but to the power of the court and the legality of the order. Any judgment or ruling so entered without authority or jurisdiction is void. See, Hodgin v. Whitcomb, *supra;* Kime v. Fenner, *supra;* Gamble v. Buffalo County, 57 Neb. 163, 77 N. W. 341; Mueller v. Keeley, *supra.*

The latter is the situation here for none of the statutory requirements to give the trial judge jurisdiction to rule on the motion for new trial at chambers in North Platte had been complied with when he attempted to do so on March 21, 1956. For a full discussion of the statutes here applicable, and their application, see Mueller v. Keeley, *supra.*

There was apparently an endeavor by the trial judge to breathe life into his purported order of March 21, 1956, by waiver for, at the hearing on April 4, 1956, he stated to appellee's counsel: "You dictated into my notes here that you are waiving that notice." The district judge then asked: "Now, is that what you mean?" Appellee's counsel replied thereto: "Yes, I think we have the right to waive the fact it was entered out of the county." In his order of April 4, 1956, the trial judge states: "The Defendant on motion of his attorney waives notice of hearing on the motion for a new trial that was already submitted in Lincoln County, Nebraska, on March 21st, 1956."

As we have already stated the purported order of the trial judge signed by him at chambers in North Platte in Lincoln County, Nebraska, was void at the time it was signed because the trial judge lacked jurisdiction and was therefore without authority to render it. This lack of authority cannot be supplied by subsequent waiver or consent. See Gamble v. Buffalo County, *supra.*

In view of what we have said it appears the motion for a new trial filed in this cause on January 12, 1956, remains undisposed of and, in view of that fact, this appeal has been prematurely taken; consequently, this court is without jurisdiction to consider it. We therefore dismiss the appeal.

APPEAL DISMISSED.

EDWARD D. SOUTHWELL, APPELLEE, V. ROBERT E. DEBOER ET AL., APPELLANTS.
80 N. W. 2d 877

Filed February 1, 1957. No. 34060.

1. **Trial.** A party to an action is entitled to have the jury instructed with reference to his theory of the case, when the pleadings present the theory as an issue and it is supported by competent evidence, whether requested to do so or not.
2. **Trial: Appeal and Error.** A conflicting instruction or instructions on issues the effect of which may be to mislead or confuse the jury are erroneous and prejudicial.
3. **Damages.** Physical suffering caused by injuries is in its nature inseparable from mental suffering, and where physical injuries and suffering therefrom have been proved but mental suffering has not been separately proved, it is not error for the court to instruct that mental suffering is an element which may be taken into consideration in arriving at the amount of damages recoverable.
4. **Appeal and Error.** Where the verdict returned by the jury is the only one authorized by the pleadings and proof, the giving of an erroneous instruction is not prejudicial error.
5. **Negligence: Appeal and Error.** In a case where contributory negligence is charged against a plaintiff but the physical facts

disclose conclusively that he was not so guilty, it is error for the court to submit that question as an issue to the jury; such error may not however be said to be prejudicial to the defendant making the charge, even if a phase thereof has been improperly defined.

6. **Damages.** In an action for damages, where the law furnishes no legal rule for measuring them, the amount to be awarded rests largely in the sound discretion of the jury, and courts are reluctant to interfere with a verdict so rendered.
7. **Trial: Appeal and Error.** Where the verdict returned in an action for personal injuries is challenged on appeal solely because it is excessive, it will not be disturbed by the reviewing court, unless it can say as a matter of law that, upon consideration of all the evidence, the amount of such verdict is excessive.
8. ———: ———. A verdict may be set aside as excessive by the trial court or on appeal only when it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, mistake, or some means not apparent in the record, or it is clear that the jury disregarded the evidence or rules of law.

APPEAL from the district court for Gage County: CLOYDE B. ELLIS, JUDGE. *Affirmed.*

Chambers, Holland, Groth, Dudgeon & Hastings and *Ernest A. Hubka,* for appellants.

McCown & Wullschleger, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

YEAGER, J.

This is an action for damages instituted by Edward C. Southwell, plaintiff and appellee, against Robert E. DeBoer and International Harvester Company, a corporation, defendants and appellants. The action was in two causes of action. It was tried to a jury. The jury returned a verdict in favor of plaintiff and against the defendants on the first cause of action for $17,500 and on the second cause of action for $3,500. The plaintiff filed a remittitur of $870 of the amount awarded on the second cause of action, whereupon judgment was rendered on the two causes of action for $20,130. From

this judgment the defendants have appealed. For convenience, when separate reference is required, the defendants will be referred to as DeBoer and the company.

As grounds for reversal the defendants have set forth five assignments of error. By assignments Nos. 1, 2, 3, and 4, in this order, they charge the court erred in giving instructions Nos. 14, 15, 19, and 10. By the fifth assignment of error they charge that the verdict is grossly excessive. The question of whether or not the defendants were guilty of negligence is not in issue on this appeal.

The basis of the action as pleaded by the plaintiff, to the extent necessary to set it forth here, is substantially as follows: On August 22, 1955, at about 7:30 p.m., the plaintiff was driving a 1946 Chevrolet automobile in a westerly direction upon a state highway about 4 miles northwest of Beatrice, Nebraska; that along the north side of the highway was a pile of roadmix extending southward in width about 4 feet, the length of which extended the entire length of the portion of the road which was under construction (this length was not definitely stated but it extended east and west of the point of concern here for a distance of several miles); that the width of the roadway south of the roadmix at the location in question was 19 feet; that this roadway was clear and unobstructed; that at the time of concern here the plaintiff was operating his automobile in a careful and prudent manner and about 1 foot from the south edge of the roadmix; that DeBoer was operating an International pick-up truck which belonged to the company from the west or opposite direction; that while so doing he operated it so negligently as to cause it to collide with the front end of plaintiff's automobile causing injury and damage to plaintiff and to his automobile; and that at the time DeBoer was employed by and engaged in the business of the company. The fact of employment and the capacity of the employment is not questioned by the defendants on this appeal.

In view of the fact that no question of whether or not the defendants were guilty of negligence is presented by the assignments of error it is not deemed necessary to set forth the specifications of negligence charged in the petition.

To the petition the defendants filed answers. By the answers they admitted the occurrence and otherwise generally denied the allegations of the petition. Further answering they alleged affirmatively that the proximate cause of the collision was the contributory negligence of the plaintiff. The specifications of contributory negligence were substantially as follows: (1) Failure and neglect to make reasonable observation of the approach of other vehicles including the one operated by DeBoer; (2) failure of plaintiff to drive at a reasonable and proper rate of speed having regard for the condition of the road; (3) failure of the plaintiff to have his automobile under reasonable control; and (4) failure of plaintiff to make timely application of brakes.

These affirmative allegations of contributory negligence were denied by the plaintiff. The pleadings thus summarized present the basis for the questions which require determination on this appeal.

In addition to the issues presented by the petition, answer, and reply, the defendants filed separate cross-petitions and on them issue was joined. Those issues however are of no concern on this appeal.

In order to determine the questions presented by the assignments of error it becomes necessary to examine briefly the evidence adduced at the trial. It is disclosed by the evidence that on the day in question and perhaps for some days prior thereto the surface of the traveled portion of this highway was being improved by the placement of a mixture of road improvement material thereon. The process has not been accurately described but it appears that it was being done by grading and spreading of the material over the traveled surface with a road grader from the accumulation in a row on

one side of the road. It is disclosed that this row of material began about 1 foot from the north side and extended in width about 4 feet to the south. How far to the east and to the west is not disclosed but it appears that it extended for a distance of a few miles. There was a driving space to the south at the point of collision of about 19 feet. The plaintiff's clear view to the west, according to his estimate, was from 4 to 5 blocks or from 1,200 to 1,500 feet. The area of view of DeBoer to the east was not disclosed but there is no evidence that it was restricted except possibly by dust. There is evidence that the highway was officially closed to public travel but none of it is authentic in quality.

The plaintiff testified that prior to the collision he had been driving about 1 foot south of the south edge of the roadmix. He did not testify that he was so driving at the time of the collision. He testified that he had no recollection of the collision or of seeing the approach of DeBoer theretofore. The effect of his testimony in this respect is to say that he was driving as above described; that as a result of the collision he was rendered unconscious; and that he did not recover consciousness for about 2 days. There was evidence from other witnesses that there were skid marks made by the tires of his automobile extending backward or east from the point of collision about 47 feet. The north line of the skid marks was about 1 foot from the south edge of the roadmix.

This evidence is sufficient, it is believed, to support an inference that plaintiff was at the time of the collision traveling in the manner that he had been previously traveling, and an inference that he observed the approach of DeBoer prior to the collision.

DeBoer testified on behalf of the defendants. He testified that he came onto the roadway south of the roadmix quite some distance west of the scene of the collision and that he operated the truck on the south edge of the roadway. He had no recollection of seeing the automobile of plaintiff at the time of the collision. He gave

some evidence of dust ahead of him through which he operated the truck. There were no eyewitnesses to the collision.

There was evidence from observations made after the collision that at the time the two vehicles came together the right wheels of plaintiff's automobile were about 1 foot south of the south line of the roadmix and that the left front wheel of the truck operated by DeBoer was about 3 feet south of that line, and that in this wise the front ends of the two vehicles came together.

From this evidence of course at least a reasonable inference could flow that the plaintiff was on his right side and DeBoer was on the wrong side of the road.

As pointed out the first assignment of error relates to the giving of instruction No. 14. The instruction is as follows:

"You are instructed that the law of this state provides that upon all highways of sufficient width the driver of a vehicle shall drive the same upon the right half of the highway and that drivers of vehicles proceeding in opposite directions shall pass each other to the right, each giving to the other at least one half of the main traveled portion of the roadway as nearly as possible.

"If you find from the evidence that the foregoing requirement of the law was violated by the defendant, Robert E. DeBoer, you are instructed that such violation was not in and of itself negligence but a circumstance which you may take into consideration in determining whether or not said defendant was guilty of negligence."

The particular objection, as we interpret, is not that an unsound or fallacious principle of law has been stated but that the principle applied to DeBoer in the second paragraph should have been applied as well to the plaintiff. The reason assigned for this contention is that there was an issue also as to whether or not the plaintiff was operating his automobile also in violation

of the legal principle set forth in the first paragraph of the instruction.

If on the record made there was such an issue the assignment of error is valid, otherwise it is not.

This court has said many times in somewhat varying terms but with a single meaning that a party to an action is entitled to have the jury instructed with reference to his theory of the case, when the pleadings present the theory as an issue and it is supported by competent evidence, whether requested to do so or not. See, Swengil v. Martin, 125 Neb. 745, 252 N. W. 207; Hackbart v. Rohrig, 136 Neb. 825, 287 N. W. 665; Landrum v. Roddy, 143 Neb. 934, 12 N. W. 2d 82, 149 A. L. R. 1041; Hansen v. Lawrence, 149 Neb. 26, 30 N. W. 2d 63; Fimple v. Archer Ballroom Co., 150 Neb. 681, 35 N. W. 2d 680; McKain v. Platte Valley Public Power & Irr. Dist., 151 Neb. 497, 37 N. W. 2d 923; Dunlap v. Welch, 152 Neb. 459, 41 N. W. 2d 384; Pongruber v. Patrick, 157 Neb. 799, 61 N. W. 2d 578.

An element of this rule, as is clear, is that it is not sufficient that the theory shall be made an issue by the pleadings. In order to require that an instruction be given, the theory must be supported by competent evidence. In the absence of competent evidence instruction upon it is not required nor proper.

In Swengil v. Martin, *supra,* the controlling principle is announced as follows: "While, as decided in Boice v. Palmer, 55 Neb. 389, and other cases cited hereinbefore, 'A party to an action is entitled to have the jury instructed with reference to his theory of the case, when the pleadings present the theory as an issue and it is supported by competent evidence,' logically, unless an issue is supported by competent evidence, he is not entitled to have the same submitted to the jury."

In the case at bar there is no evidence that the plaintiff was not, or from which a reasonable inference could flow that he was not, on the right half of the main traveled portion of this roadway. In this light there was no

issue as to whether or not he was on the wrong side thereof. The first assignment of error is therefore without merit.

By the second assignment of error it is charged that instruction No. 15 is contradictory and confusing. The instruction is as follows:

"You are instructed that you cannot find that either of the drivers in this case were negligent simply because they were driving on a road that was closed or partially closed to traffic generally, if you so find.

"You may consider this circumstance, along with all the other facts and circumstances as shown by the evidence, in determining whether or not either of said drivers was negligent at the time and place in question."

It is of course true that a conflicting instruction or instructions on issues the effect of which may be to mislead or confuse the jury are erroneous and prejudicial. See, Heif v. Roberts Dairy Co., 138 Neb. 885, 296 N. W. 331; Harsche v. Czyz, 157 Neb. 699, 61 N. W. 2d 265; Barney v. Adcock, 162 Neb. 179, 75 N. W. 2d 683.

Within the meaning and a proper application of this rule to the facts of this case it may not well be said that this instruction was either improper or prejudicial.

The defendants urge that by the first paragraph an issue as to whether or not the plaintiff and DeBoer were, at the time in question, driving on a road that was partially closed to traffic generally was excluded from consideration by the jury, but that it was erroneously put back by the second paragraph.

As has been pointed out there was some evidence relating to the question of whether or not the road was officially closed to traffic generally but that it lacked authenticity. By the statement of lack of authenticity was not meant that there was no evidence that the road was closed but only that there was no official information adduced that it was closed.

The purpose and effect of the instruction, as we interpret, was to say that while there was no issue as to

whether or not the road was officially closed to be decided, yet the evidence in relation to that subject related to a circumstance or circumstances which the jury had the right to consider along with other facts as shown in the determination of whether either or both of the parties were negligent. This was not error. It conforms to the rule, which requires no citation, that in all propriety the trial court should tell the jury that it has the right to consider all facts and circumstances proved bearing upon the issues presented for determination.

The next assignment of error charges that by instruction No. 19 the court submitted as an issue "mental suffering" of the plaintiff whereas there was none proved.

It is true that mental suffering as such was not proved. In the light, however, of substantial authority this lack of proof did not deprive the court of the right to submit the question or the jury to consider it and to return a verdict in contemplation thereof.

In American Water-Works Co. v. Dougherty, 37 Neb. 373, 55 N. W. 1051, it was said: "The plaintiff in error also contends that the court erred in instructing the jury that they might consider mental suffering and anxiety in estimating the damages. This instruction was correct. Owing to the nature of things there can be no precise scale for weighing damages in such cases. Physical suffering caused by such injuries is in its nature inseparable from mental suffering and anxiety from the same cause. Whatever may be the rule as to the recovery of such damages where there has been no physical injury, where such physical injury has been sustained, mental suffering and anxiety are, as much as physical, an element for which the plaintiff should be compensated." This conclusion was approved in Omaha Street Ry. Co. v. Emminger, 57 Neb. 240, 77 N. W. 675. We have not found that this court has ever departed from it.

The defendants appear to contend that by the opinion

in Mick v. Oberle, 124 Neb. 433, 246 N. W. 869, the court was deprived of the right to submit the question to the jury. This contention may not be sustained. In that case the subject was "mental injuries" as distinguished from "mental suffering." In that case the principle announced in American Water-Works Co. v. Dougherty, *supra,* was not referred to nor overruled.

In the light of this inseparable nature of physical and mental suffering as a consequence of physical injuries and the pleadings and evidence in this case it appears that there was no error in the giving of this instruction.

By the petition the plaintiff sought to recover for "physical pain" and "mental anguish" and the evidence without question sustained the allegation of physical pain which, as has been pointed out, is inseparable from mental suffering. The fact that the term "anguish" rather than "suffering" was employed is of no real concern.

By the next assignment of error the defendants contend that the giving of instruction No. 10 was erroneous for the reason that it contains an erroneous and prejudicial definition of slight negligence.

As has been pointed out the question of whether or not DeBoer was negligent is not a subject for consideration on this review. The question of his degree of negligence within the meaning of the comparative negligence law and the degree of plaintiff's negligence, if any, is here for consideration. In particular the question of whether or not plaintiff was guilty of any negligence at all is presented.

The plaintiff contends substantially that there is no evidence that he was guilty of any negligence which caused or proximately contributed to the collision, and that in consequence of this even if the definition is not a proper one it is not prejudicial since the verdict which was rendered on the question of negligence was the only one of which the evidence was capable.

It is of course true that if the record sustains this

premise and conclusion of the plaintiff necessity does not arise to consider the assignment of error further.

In the early case of Locke v. Shreck, 54 Neb. 472, 74 N. W. 970, it was said: "Where the verdict returned by the jury is the only one authorized by the pleadings and proof, the giving of an erroneous instruction is not prejudicial error." To the same effect are the pronouncements in the following cases: Leichner v. First Trust Co., 133 Neb. 170, 274 N. W. 475; Kimball v. Cooper, 134 Neb. 536, 279 N. W. 194.

The evidence in this case is convincing that the contention of the plaintiff as to this assignment must be sustained. The undisputed physical facts demonstrated that the plaintiff was not negligent in the operation of his automobile at the time of the collision. He was driving prior thereto where he had the right to drive and the tire marks of the automobile showed conclusively that he was so continuing to drive at the time the collision took place. The physical facts further showed conclusively that DeBoer left the place of safety where he testified that he had been driving and without apparent reason came across directly into the path of plaintiff.

A case directly in point in legal principle and analagous facts is Hessler v. Bellamy, 128 Neb. 571, 259 N. W. 514. The effect of the principle declared in that case applied to this case is to say that in a case where contributory negligence is charged against a plaintiff but the physical facts disclose conclusively that he was not so guilty it is error for the court to submit that question as an issue to the jury. The error may not however be said to be prejudicial to a defendant making the charge against a plaintiff, even if a phase thereof is improperly defined. See, Shiers v. Cowgill, 157 Neb. 265, 59 N. W. 2d 407; Gilliland v. Wood, 158 Neb. 286, 63 N. W. 2d 147; Young v. Stoetzel, 159 Neb. 624, 68 N. W. 2d 186. In the light of the conclusion reached in this respect it

must be said that the fourth assignment of error is without merit.

By the last assignment of error the defendants urge that the verdict is excessive.

As a general rule for the guidance of courts in determining whether or not the verdict of a jury is excessive the following was said in Remmenga v. Selk, 152 Neb. 625, 42 N. W. 2d 186: "In an action for damages, where the law furnishes no legal rule for measuring them, the amount to be awarded rests largely in the sound discretion of the jury and courts are reluctant to interfere with a verdict so rendered."

In Banta v. McChesney, 127 Neb. 764, 257 N. W. 68, it was said: "Where the verdict returned in an action for personal injuries is challenged on appeal solely because excessive, it will not be disturbed by the reviewing court, unless it can say as a matter of law that, upon consideration of all the evidence, the amount of such verdict is excessive."

In Plumb v. Burnham, 151 Neb. 129, 36 N. W. 2d 612, it was said: "A verdict may be set aside as excessive by the trial court or on appeal only when it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, mistake, or some means not apparent in the record, or it is clear that the jury disregarded the evidence or rules of law." These three rules have been repeated in Shiers v. Cowgill, *supra.*

There is nothing in the record to indicate that the verdict returned was the result of passion or prejudice. There is an indication that there was a mistake which amounted to a departure from rules of law. This was capable of being and was properly corrected by the trial court after verdict by remittitur.

In explanation, the plaintiff pleaded his right of recovery in two causes of action. On his first cause of action he sought to recover all of his damages except special damages capable of accurate determination at

the trial. By the second cause of action he sought recovery of these special damages.

The verdict as to the second cause of action was for $3,500. This was about $870 in excess of the special damage proved. The court overruled the motion of defendants for a new trial on condition that the plaintiff remit $870. The condition was accepted by the plaintiff and the amount was duly remitted. No procedural error in this respect is assigned.

As to the first cause of action the evidence of the plaintiff in brief detail substantially disclosed that the plaintiff was 28 years of age and was a farm worker; that at the time of his injury his wage was $125 a month; that he was unable to work at all for 4 months; that on return to work his wage was $78 a month; and that this reduction was occasioned by the condition of plaintiff. The injuries sustained by plaintiff as described by the physician in attendance on the date of the collision were considerable shock, three jagged cuts on the chin, a broken jaw, a wound over the left knee 8 inches in length and into the bone, severe pain from the date of injury to the time of trial, and permanent partial disability in the knee to the extent of 15 per cent. A dentist described injuries which he found as two fractures of the left ascending ramus of the mandible, a comminuted compound fracture of the symphysis of the mandible, a fracture of the left alveolar process, and the loss of six teeth; that he gave operative treatment to reduce the fractures; that he later removed four teeth; that the operative treatment required immobilization of the joint; and that at the time of trial the plaintiff had limited motion in opening his mouth which limited motion will continue with but slight improvement, leaving disability to the extent of 25 to 30 per cent.

This review is lacking in detail but it is thought that it presents a fair background of the evidence, at least not one unfavorable to the defendants, for the application of the general rules hereinbefore set forth to the

assignment of error charging that the verdict is excessive.

The verdict on the first cause of action was for $17,500. In the light of the evidence in this case and the foregoing rules for guidance and the factual situations out of which they flowed, we are unable to say that the verdict here is excessive. Accordingly the judgment of the district court is affirmed.

AFFIRMED.

LESLIE H. ROLFSMEIER, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

80 N. W. 2d 885

Filed February 1, 1957. No. 34069.

1. **Criminal Law: Appeal and Error.** In an appeal of a criminal proceeding to the district court, the district court is required, under the provisions of section 29-613, R. R. S. 1943, to order the filing of a proper complaint at any stage of the proceedings if the complaint on file is insufficient or defective.
2. ———: ———. The manner in which the district court brings about a compliance with section 29-613, R. R. S. 1943, is not material in the absence of a showing of prejudice to the rights of the defendant.
3. ———: ———. The provisions of section 27-1306, R. R. S. 1943, have no application to appeals to the district court in criminal proceedings.
4. ———: ———. Where the evidence in a criminal case is in conflict, it raises an issue for the jury to determine under proper instructions. The verdict of the jury on disputed questions of fact will not be interfered with on appeal if there is sufficient evidence in the record to support the findings of the jury.

ERROR to the district court for Seward County: H. EMERSON KOKJER, JUDGE. *Affirmed.*

McKillip, Barth & Blevens, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Ralph D. Nelson,* for defendant in error.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CARTER, J.

Plaintiff in error, Leslie H. Rolfsmeier, hereinafter called the defendant, was charged with unlawfully operating his automobile upon a public highway in Seward County on September 30, 1955, at a rate of speed in excess of 50 miles per hour between the hours of sunset and sunrise contrary to the provisions of section 39-723, R. R. S. 1943. The defendant pleaded not guilty. On a trial by jury, defendant was found guilty and sentenced to pay a fine of $20 and costs. Defendant prosecutes error.

On October 20, 1955, a transcript on appeal was filed in the district court for Seward County which contained certified copies of the complaint, warrant, judgment, and appeal bond. It did not contain the original complaint. On February 9, 1956, the trial court directed the county attorney to cause the original complaint to be filed in the district court. This was done on February 10, 1956. The trial was commenced on February 16, 1956. The defendant concedes the right of the district court to direct the filing of the original complaint in the district court but contends that it must be done within 50 days in accordance with section 27-1306, R. R. S. 1943.

The position of the defendant is not a tenable one. It is provided in section 29-613, R. R. S. 1943, as follows: "The district court shall hear and determine any cause brought by appeal from a magistrate upon the original complaint, unless such complaint shall be found insufficient or defective, in which event the court, at any stage of the proceedings, shall order a new complaint to be filed therein, and the case shall proceed thereon the same in all respects as if the original complaint had not been set aside."

In Bays v. State, 6 Neb. 167, the court considered

the foregoing statute in a case where the original complaint was lost. The prosecuting attorney moved for leave to file a substitute complaint charging the same offense as that designated in the original, and, over the objection of the defendant, was permitted to do so. The case was tried, the defendant found guilty, and error proceedings prosecuted. This court therein said: "It is evident that, under this provision, no matter how utterly deficient the complaint sent up by a magistrate may be, even if totally wanting in the essential requisites to show the offense intended to be charged, the prosecution will not be thwarted, but 'the court shall order a new complaint to be filed,' upon which the trial must proceed. This section establishes a positive rule of practice by which the courts are of course bound whenever the original complaint is found to be defective. And it does more than this - it furnishes a safe guide to the courts in matters of practice whenever a contingency shall arise, which, although not within the letter, is clearly within the spirit of the statute. In the practice of the courts contingencies not *unfrequently* arise which the legislature has not anticipated by any suitable provision. These must be met by some general or special rule of court suited to the exigency, and which shall protect suitors in all their legal rights. It seems to us that there is quite as much necessity and reason for the substitution of a new complaint when the original is lost as there is when found to be merely defective in form or in substance."

The foregoing quotation was approved in Lindley v. State, 117 Neb. 597, 221 N. W. 706. In that case the original complaint was not before the district court or at the command of either party for the purpose of the trial. Objection was made before the impaneling of the jury on the ground that no complaint or information was on file in the district court against the defendant. The motion was overruled. A trial was had, the defendant convicted, and error proceedings brought. This

court held that the objection was timely made, and reversed the case with leave given the State to produce the original complaint if it can be found, and if not, to prepare and file a new complaint covering the same offense. This is consistent with the language of section 29-613, R. R. S. 1943, providing that the court at any stage of the proceedings shall order a new complaint to be filed in place of an insufficient or defective one.

In the instant case a certified copy of the complaint was all that was before the court on February 9, 1956. It is the duty of the court to direct the filing of a proper complaint, in this case the original, at any stage of the proceedings. The contention that the authority of the district court is limited to a period of 50 days after entry of the judgment below is in direct conflict with the statute providing that the court shall make such an order at any stage of the proceedings if it appears that the complaint is insufficient or defective. The trial judge performed a duty imposed upon him by statute in directing the filing of the original complaint in the district court. In any event, the 50-day provision contained in section 27-1306, R. R. S. 1943, relates to civil actions and has no relation to appeals to the district court in criminal proceedings.

The fact that the trial court secured a compliance with his order without making a formal written order is not material here. It is not shown that the defendant was prejudiced in any manner by the method employed. Nor may error be predicated on the fact that the defendant or his counsel was not present when the direction was given. It was a statutory procedural matter that was involved. The defendant was not prejudiced by the court orally directing a compliance with the statute with reference to the filing of a proper complaint prior to the commencement of the trial. If objection had been made before trial to the sufficiency of the complaint, it would have been error to proceed without proper corrective measures being taken. The trial court acted

in the manner contemplated by the statute. While it would have been the better practice to have made a formal record, there is no showing that the defendant was in any manner prejudiced by the method pursued. The claim of prejudicial error cannot be sustained.

The defendant contends that the evidence is insufficient to sustain the conviction. The State called but one witness, Irvin E. Minary, a member of the Nebraska Safety Patrol, who made the arrest. He testified that he made the arrest at 7:25 p.m., that the head and tail lights on defendant's automobile were lighted, that he followed defendant for a distance of one-half mile at a speed of 70 miles per hour, and that defendant was pulling away from him. Defendant denies that he drove in excess of 50 miles per hour. There was other evidence by the patrolman and the defendant as to the circumstances surrounding the incident. The issue of fact thus created was for the jury who resolved it against the defendant. The evidence was sufficient to sustain the jury's verdict. The arguments advanced in his brief were proper to be made to the jury, but they can serve no purpose here under the state of the record. There was no objection to the evidence of the patrolman herein related. The credibility of the patrolman and the weight to be given to his evidence were questions for the jury under the proper instructions. Error in the instructions is not assigned.

We find no error in the record prejudicial to the rights of the defendant. The judgment of the district court is affirmed.

AFFIRMED.

MARILYN WILSON, THROUGH AND BY HER FATHER AND NEXT FRIEND, BRYCE WILSON, APPELLANT, V. NORTH CENTRAL GAS COMPANY, A CORPORATION, APPELLEE.

80 N. W. 2d 685

Filed February 1, 1957. No. 34073.

1. **Negligence.** The elements of actionable negligence are a duty of the party charged with negligence to protect the injured party from injury, failure to satisfy that obligation, and injury resulting therefrom.
2. ———. A construction contractor is not liable for injuries or damage to a third person with whom he is not in contractual relation resulting from the negligent performance of his duty under his contract with the contractee where the injury or damage is sustained after the work is completed and accepted by the owner.
3. ———. The burden is on the plaintiff to establish that the contractor was in charge and control of the work at the time of the accident because of which the plaintiff seeks to recover damages from the contractor.
4. ———. The acceptance that is required by the proprietor of the work of a contractor, in order to relieve him of liability for injury to a third person after the acceptance, is a practical acceptance after the completion of the work. A formal acceptance is not required.

APPEAL from the district court for Cheyenne County: JOHN H. KUNS, JUDGE. *Affirmed.*

Heaton & Heaton, for appellant.

Martin, Davis & Mattoon and *Gerald E. Matzke,* for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, WENKE, and BOSLAUGH, JJ.

BOSLAUGH, J.

This case involves a claim for damages by appellant against appellee because of personal injuries caused her, as she asserts, by the negligence of appellee. Appellant was an infant when the litigation was instituted but before the trial she married, became of legal age, and the

case has proceeded in her present name, Marilyn Wilson Howerter.

The substance of the cause of action alleged by appellant is as follows: Appellee is a domesticated foreign corporation engaged in the sale and distribution of natural gas in the city of Sidney. Prior to September 29, 1954, it excavated a ditch across the premises of the school district of that city, installed a pipe therein, and covered it by filling the ditch with the earth excavated therefrom. It negligently permitted the dirt put in and over the excavation to extend a height of 3 to 8 inches above the surface of the adjoining ground causing an obstruction in, upon, and across the north side of the school district premises south of but near the sidewalk along the premises. Appellee negligently failed to install and maintain any sign, devices, or lights to warn persons, including appellant, of the existence and any hazard of the obstruction. Appellant was going to the high school building on the premises south of the location where the excavation was made in pursuance of her duties as a senior student in the school at about 7:30 p. m., on September 29, 1954. When she crossed the area where the excavation had been made, without knowledge of or notice concerning the obstruction, she was thereby caused to trip and fall, as a consequence of which she suffered a severe comminuted fracture of her right femur at about the juncture of the middle and lower thirds.

Appellee in defense admitted it was a corporation and that appellant was injured September 29, 1954; denied all other claims of appellant; and alleged that it installed a service gas line upon the premises of the school district in a careful and prudent manner, that all the work in reference thereto was completed on or about August 5, 1954, that the work done by appellee was inspected and accepted by the school district on that date, that appellee had not since had any occupancy of the premises where the work was done, that it was not occupying the

premises on September 29, 1954, and that any injuries sustained by appellant were the result of her negligence.

The trial of the case terminated by the court sustaining the motion of appellee for a dismissal of the case at the close of the evidence-in-chief of appellant and the rendition of a judgment of dismissal of the case. The appeal presents an issue as to whether or not the evidence of appellant and permissible inferences therefrom, when considered most favorably to her, are sufficient to sustain a verdict in her favor for any amount.

The Sidney high school building faces east. The school grounds are bounded by a street on the north and on the east. There is a sidewalk on the east and the north of the grounds and a lawn between the sidewalk and the school building in the area important to this case. Two front entrances to the building are on the east and there is a sidewalk from the one farthest north which extends east and connects with the north-and-south sidewalk in front of the building. The lawn in the northeast area is raised from near the sidewalk to the school building about 1½ feet. There was no playground equipment or anything of that nature in the area at the time of the accident. The walks were not then obstructed in any way and appellant could have used them to reach the building on the evening of the accident.

The school district, sometime before August 5, 1954, engaged appellee to and it did install a service gas line across the school grounds a few feet south of the east-and-west sidewalk and north of the north side of the school building. The service gas line, as constructed at that location, was inspected by the city inspector of the city of Sidney on August 5, 1954, and he then approved the manner of its installation. On that date the line was fully completed by appellee. When the excavated ditch in which the pipe was placed was filled, the backfill sloped up from the edges of the excavation towards the center thereof so that it extended above the ad-

jacent ground about 6 inches at the place of the accident. This formed a mound of dirt over the place where the ditch had been and this was the situation on September 29, 1954.

Appellant was on her way to the high school building to attend a meeting which she was duty-bound to do as a senior student of the school at about 8:30 p. m., September 29, 1954. She and two other senior students of the school parked the automobile in which they were traveling on the south side of the street north of the school building near the northeast corner of the school grounds. The night was wet, cold, cloudy, and very dark. They crossed the north sidewalk and ran across the northeast corner of the school lawn towards the north one of the entrances of the school building on the east. Appellant in some manner tripped over the mound of dirt referred to and she sustained the injuries she complains of in this case. There was a light on the front of the school building and a street light on a pole about 5 feet east of the sidewalk opposite the northeast corner of the school grounds. Appellant could see the sidewalk and she could have seen the mound which caused her to fall if she had looked for it. She had been instructed by school authorities not to walk on the lawn but to use the walks provided for that purpose.

The occurrence of an accident which causes injury and does damage does not create a presumption or authorize an inference of negligence. Tews v. Bamrick & Carroll, 148 Neb. 59, 26 N. W. 2d 499. The elements of actionable negligence are a duty of the party charged with negligence to protect the injured party from injury, failure to satisfy that obligation, and injury resulting therefrom. Scottsbluff Nat. Bank v. First State Bank, 162 Neb. 475, 76 N. W. 2d 445.

It was indispensable to any recovery in this case that appellant show by evidence that appellee was at the time of the accident in control of the premises upon which appellant was injured. This requirement in a case of

this character was recognized and stated in Haynes v. Norfolk Bridge & Constr. Co., 126 Neb. 281, 253 N. W. 344: "The burden was upon the plaintiff to establish that the contractor was yet in charge and control of the work at the time of the accident." See, also, Shupe v. County of Antelope, 157 Neb. 374, 59 N. W. 2d 710; Rengstorf v. Winston Bros. Co., 167 Minn. 290, 208 N. W. 995; Annotations 7 A. L. R. 1211, 104 A. L. R. 967, 13 A. L. R. 2d 202; 65 C. J. S., Negligence, § 94, p. 609, § 200, p. 936.

There is no proof in this case that appellee was in the occupancy or control or that it had any relationship, duty, or right whatever at the time of the accident in reference to the premises upon which appellant fell and was injured or in reference to any instrumentality thereon. The record is that the construction of the service line was fully completed by appellee on August 5, 1954, and on that date the city inspector of the city of Sidney made an examination and approved the manner of the installation. There is no showing that any change in it was made or that its condition was in any way altered between that date and time of the accident. The acceptance and use by the school district of the construction is inferable from the record. In any event, it was the burden of appellant to show that it was not, if such was the fact.

In Haynes v. Norfolk Bridge & Constr. Co., *supra,* this court said: "The acceptance that is required by the proprietor of the work of a contractor, in order to relieve the contractor of liability for injuries to third persons after the acceptance, is a practical acceptance after the completion of the work, a formal acceptance not being required."

A recent decision of this court much relied on by appellant, Hickman v. Parks Constr. Co., 162 Neb. 461, 76 N. W. 2d 403, is distinguishable from this case because of the wide difference in the facts of the cases. The Hickman case concerned an open, unguarded, and dan-

gerous excavation. The construction work being done on the premises, of which the excavation was a part, was incomplete. The premises where the accident occurred and the construction that was in progress were in the possession and under the control of the defendant in that case. The Hickman case has no similarity or application to this case.

The judgment of the district court should be and it is affirmed.

AFFIRMED.

CHAPPELL, J., participating on briefs.

CHARLEY W. PETERSON, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

80 N. W. 2d 688

Filed February 1, 1957. No. 34075.

1. **Judgments: Evidence.** The record of a court in which a cause originated or was tried, when properly authenticated, imports verity and cannot be impeached, varied, or changed by oral testimony or extrinsic evidence.
2. **Criminal Law: Juries.** Unless otherwise provided by statute, one charged with a statutory misdemeanor has the right to demand a trial by jury in the county where the offense is alleged to have been committed but may waive his right thereto.
3. **Automobiles: Evidence.** Evidence of the readings of radar equipment designed to determine the speed of moving vehicles is admissible as evidence of speed if a sufficient foundation is laid as to the accuracy of the equipment in operation.
4. ———: ———. The testimony of an officer as to the speedometer reading of a car driven by him at a given time is competent prima facie evidence of the speed of the car at the time. Evidence as to the accuracy of the speedometer is not required as a foundation to that evidence.
5. **Appeal and Error.** In an action either civil or criminal, tried to the court without a jury, the erroneous admission of evidence is immaterial on appeal where the judgment below is sustained by sufficient competent evidence.

ERROR to the district court for Douglas County: L. ROSS NEWKIRK and PATRICK W. LYNCH, JUDGES. *Affirmed.*

Francis A. McLane, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Ralph D. Nelson,* for defendant in error.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, WENKE, and BOSLAUGH, JJ.

SIMMONS, C. J.

Plaintiff in error, hereinafter called the defendant, was charged with the operation of a motor vehicle on a public highway in Douglas County at a rate of speed greater than was reasonable and prudent under the conditions then existing and at a rate of speed in excess of 60 miles per hour. The statute involved is section 39-723, R. R. S. 1943.

Defendant was found guilty in county court and a fine was assessed. He appealed to the district court where he was again found guilty and a fine was assessed.

He brings the matter here asserting that he was denied a right of trial by jury; that incompetent and hearsay evidence was admitted; and that the evidence is insufficient to sustain a conviction. We affirm the judgment of the trial court.

The date of the offense charged was December 2, 1954. Defendant was tried in county court and found guilty on December 15, 1954. An appeal was promptly lodged in the district court. No further action appears to have been taken until March 16, 1956. The journal entry shows that on that date the case was called for trial pursuant to notice; and that a panel of veniremen for jury was present. It further shows that defendant's attorney was present but defendant was in default of appearance. The journal further shows that by reason of defendant's default in appearance, a jury trial was denied and defendant was given leave to have trial before the court without a jury. The journal entry is in accord with the bill of exceptions. It does not appear that the defendant objected to the order made. The

above proceedings were before Judge Newkirk.

The bill of exceptions recites that on March 23, 1956, the cause came on for trial to the court before Judge Lynch; that the defendant pleaded not guilty and asked permission to go to trial without the defendant's presence; and that trial was had.

The journal entry recites that on March 23, 1956, the defendant appeared in open court with his counsel, was arraigned, and pleaded not guilty, and "Thereupon, a trial by jury being waived, said cause comes on for trial to the Court."

On the above record defendant assigned as error that he was denied the right to a trial by a jury.

In McDonald v. State, 161 Neb. 118, 72 N. W. 2d 521, we restated the long-established rule that: "It is a fundamental rule applicable to appellate proceedings that the record of a court in which a cause originated or was tried, when properly authenticated, imports verity and cannot be impeached, varied, or changed by oral testimony or extrinsic evidence."

The record showing a jury trial to have been waived imports absolute verity.

We have held: "Unless otherwise provided by statute, one charged with a statutory misdemeanor has the right to demand a trial by jury in the county where the offense is alleged to have been committed but may waive his right thereto." Peterson v. State, 157 Neb. 618, 61 N. W. 2d 263. It follows that there is no merit to this assignment.

Defendant's next assignments of error go to the admission of evidence and the sufficiency of the evidence to sustain the finding of guilt made by the trial court.

This case involved the use of a speed meter, commonly known as radar. The evidence shows that when defendant passed the test point on the highway the speed meter showed his speed to be 70 miles per hour.

In Deitze v. State, 162 Neb. 80, 75 N. W. 2d 95, we held: "Evidence of the readings of radar equipment de-

signed to determine the speed of moving vehicles is admissible as evidence of speed if a sufficient foundation is laid as to the accuracy of the equipment in operation."

Defendant challenges the sufficiency of the foundation laid by the State as to the accuracy of the speed meter insofar as it relates to the showing of the speed of defendant's car. The efficiency of the speed meter and its manner of operation otherwise is not challenged in argument here.

The State offered evidence that a patrol car was driven past the speed meter on two occasions, once before and once after the time the defendant drove past it. The patrol car was operated with a speedometer which indicated a speed of 60 miles an hour at that point. The speed meter indicated 60 miles an hour at that point as the speed of the patrol car.

Defendant's contention is that there must be foundation evidence of the accuracy of the speedometer before it can be accepted as a foundation for the accuracy of the reading of the speed meter. The State's evidence produced in part by cross-examination of the State's witnesses showed that the patrol car used in the test had been bought new and had been used only a few weeks, that it had normal tires, and that the speedometer had been tested and was found to be accurate by one Carl Anderson through the use of machines for that purpose. Anderson was not called as a witness. The defendant claims that the testimony as to Anderson's tests, admitted over objections, was hearsay and incompetent and deprived him of his right of cross-examination.

There is objection also to the admissibility of radio conversations between the patrol officers during these tests.

The direct issue upon which these arguments are bottomed is that evidence as to the showing of speedometer readings is inadmissible unless the accuracy of the speedometer involved is shown by competent evidence.

This precise question was presented to the English

Court of Appeal in Nicholas v. Penny, 2 KB 466, (1950, Vol. 2) All Eng. 89, 21 A. L. R. 2d 1193. That was a speeding case. The police officer testified to the speedometer reading of his car while following the defendant. He further testified that the speedometer had been tested by himself and two other officers and had been found to be accurate. The two other officers did not testify. Their evidence was necessary to show the accuracy of the tests. The court held that the evidence of the testifying officer as to information given by the other officers was hearsay and inadmissible. The court then held that the evidence of the officer as to the reading of the speedometer was competent and admissible.

The rule of the case is that the testimony of an officer as to the speedometer reading of a car driven by him at a given time is competent prima facie evidence of the speed of the car at the time. Evidence as to the accuracy of the speedometer is not required as a foundation to that evidence.

This same question was presented in People v. Tyler, 109 N. Y. S. 2d 756, wherein the court held: "The accuracy of speedometers is a matter of general knowledge. Proof of accuracy carried back to proof of the accuracy of the master speedometer and all of its parts is not necessary in speed prosecutions."

We adopt the reasoning of these cases and the conclusion based thereon.

We do not deem it necessary to point out the evidence that was objected to as hearsay and admitted. Some of it went to immaterial matters and other parts were corroborative of evidence properly admitted. The rule is: "In an action, either civil or criminal, tried to the court without a jury, the erroneous admission of evidence is immaterial on appeal where the judgment below is sustained by sufficient competent evidence." Peterson v. State, *supra*.

Finally defendant argues that his conviction rests solely upon the readings of the speed meter and the

speedometer, and that that evidence is not sufficient to prove guilt beyond a reasonable doubt. We do not so read the record.

A patrol officer on direct examination answered "Yes" to a question which involved the element of having observed defendant's car passing his position at a speed of 70 miles an hour. The trial court later asked this witness as to his observation of the defendant's car. The officer testified to having seen it enter the radar beam and pass on down the road about a mile. He was then asked, and answered: "THE COURT: Do you have an opinion independent of the radar speed indicator as to the speed of the car? A-Yes. THE COURT: In your opinion what was that speed? A-My opinion the speed was 70 miles an hour."

On recross-examination he testified that his estimate was based on his observation of the vehicle and that his opinion was not influenced by the reading made by the speed meter.

The evidence is found sufficient to sustain the judgment of the trial court.

AFFIRMED.

CHAPPELL, J., participating on briefs.

FRANK MICHAUD, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
80 N. W. 2d 888

Filed February 1, 1957. No. 34090.

Statutes: Sales. A person who delivers merchandise in accordance with the provisions of a contract of sale theretofore duly entered into by the parties to the transaction is not an itinerant merchant within the meaning of sections 60-703, R. S. Supp., 1955, and 60-704, R. R. S. 1943.

ERROR to the district court for Cuming County: FAY H. POLLOCK, JUDGE. *Reversed and remanded with directions to dismiss.*

Leamer & Graham, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Homer G. Hamilton,* for defendant in error.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, WENKE, and BOSLAUGH, JJ.

MESSMORE, J.

The plaintiff in error, Frank Michaud, hereinafter referred to as defendant, was arrested for violation of the Nebraska Itinerant Merchant Act. He was convicted in the county court of Cuming County and fined $25 and costs. Appeal was taken to the district court for Cuming County. The defendant waived a jury and trial was had to the court. He was convicted and fined $25 and costs. The case is here by petition in error.

The parts of the Itinerant Merchant Act relevant to a determination of this case are as follows:

Section 60-703, R. S. Supp., 1955, provides in part: "As used in sections 60-701 to 60-717, unless the context otherwise requires: (1) Itinerant merchant shall mean every person, firm, partnership, corporation, association, receiver, or trustee buying for the purpose of sale in any form or selling or offering to buy for the purpose of sale in any form or to sell in this state, at wholesale or retail, any goods, wares, merchandise, or chattels of any description and transporting the same by the use, upon any public highway, of a motor truck or trucks or any other vehicle or vehicles, except as herein otherwise provided. * * * (2) Itinerant merchant shall not mean or include, and there shall be exempt from the provisions of sections 60-701 to 60-717 * * * (b) those transporting products or property when such transportation is incident to a business conducted by them at an established place of business operated by them either within or without this state, and when the property is being transported to and from the established place of business, and when the entire course of such transporta-

tion extends not more than two hundred fifty miles from the established place of business; Provided, that when the entire course of the transportation is for the purpose of delivery of the property subsequent to sale thereof, the two hundred fifty miles restriction shall not apply; * * *."

Section 60-704, R. R. S. 1943, provides: " 'Established place of business' shall mean any permanent warehouse, building or structure, either owned in fee or leased, at which a legitimate permanent business is carried on as such in good faith and not for the purpose of evading this act, and at which stocks of the property being transported are produced, stored or kept in quantities reasonably adequate and usually carried for the requirements of such business, and shall not mean tents, temporary stands, or other temporary quarters, nor permanent quarters occupied pursuant to any temporary arrangement."

The first question necessary to determine is whether or not the defendant is an itinerant merchant within the meaning of the Nebraska Itinerant Merchant Act. If the defendant is not within the terms of the act, the other question presented, relating to the constitutionality of the act, need not be determined.

The record discloses that Frank Michaud, the defendant, is a truck grain dealer and has been in business for the past 8 years. He is a member of a partnership with two of his brothers. His father owned and operated the business for 46 years. The place of business is Jefferson, South Dakota. The facilities of the business consist of a large warehouse building used for storage, a machine shop equipped for engine work and truck repair, an underground gas system and pump, 4 trailers, 1 straight truck, and 5 trailer trucks, also a pickup truck, all licensed in South Dakota and used in Nebraska. The defendant, during the winter, buys and stores about 40,000 bushels of corn at various locations in Minnesota and South Dakota. He stores no corn at the place

of business. He testified that no grain is required to be stored at the place of business to be reasonably adequate to conduct the business.

Robert Beckman, manager of the Farmers' Elevator at Beemer, Nebraska, testified that he had purchased grain from the defendant for approximately 3 years, the purchases being made practically every week. On or about March 30, 1956, the defendant called him by telephone and inquired whether or not he wanted some corn. He did, and the parties agreed upon the price of the corn and the quantity. The quality was pretty well understood, that the corn would be No. 2 yellow corn. In the event the corn was inferior in quality, an adjustment would be made or the corn rejected. The amount of the purchase was paid by check each week. Beckman further testified that at the conclusion of the telephone conversation he had made his purchase of corn and was obligated to pay for the corn contracted for, and the defendant was obligated to make delivery of the corn. In the event the price of corn should increase or decrease during the interim between the purchase and delivery of the corn, such fact would not affect the price agreed upon at the time of the purchase over the telephone. Beckman further testified that he considered the defendant a reliable businessman, and not a peddler. He stated that a peddler is "A man, * * * who works the highway with a load of corn, stopping at every elevator and now and then an occasional farmer, trying to sell it."

The record shows that Jefferson, South Dakota, apparently is within 250 miles of Beemer, Nebraska.

The object of the legislation is to protect the public against fraud which might be practiced by the sale of inferior grades of certain merchandise or by dishonest weights and measures, also to insure payment for products purchased by itinerants. This type of legislation involves the exercise of the police power.

The record shows that the defendant is the owner

of the corn before he sells it; and before any corn is transported on Nebraska highways it has been purchased by an agreement over the telephone between Beckman and the defendant, wherein the price is agreed upon as well as the quantity. The defendant did not come into this state and attempt to solicit a sale of the corn or to find a buyer. As shown by the evidence, there is no buying, selling, or offering to buy in this state, as contemplated by the act.

The statute clearly recognizes that there may be a delivery after the sale has been made. Subdivision (b) of subsection (2) of section 60-703, R. S. Supp., 1955, as above set out, reads in part as follows: "Provided, that when the entire course of the transportation is for the purpose of delivery of the property subsequent to sale thereof, the two hundred fifty miles restriction shall not apply; * * *."

The State contends that there is no sale of corn until delivery is completed. The evidence shows that this is not the interpretation placed upon the contract by Beckman, the elevator manager, or the defendant. The delivery of the corn constituted a part of the carrying out of the contract which had already been consummated, and nothing more. It is apparent from the record that the contract for the sale of the corn was made in South Dakota. In the instant case the action of the State was an interference with the fulfillment of a contract which the parties had a right to make and did make.

We conclude that the defendant is not an itinerant merchant within the contemplation of the Nebraska Itinerant Merchant Act.

With reference to section 60-704, R. R. S. 1943, heretofore set out, it defines an established place of business under the act. This section would only be involved in this case in the event the defendant came within the act as an itinerant merchant. Under our holding, it becomes unnecessary to determine whether or not this section of the statute is constitutional.

The judgment of the district court should be and is hereby reversed and the cause remanded with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

CHAPPELL, J., participating on briefs.

ANNA M. WRIGHT, APPELLEE, V. LINCOLN CITY LINES, INC., ET AL., APPELLANTS.
81 N. W. 2d 170

Filed February 8, 1957. No. 34029.

1. **New Trial: Appeal and Error.** When a trial court gives no reason for granting a new trial then, on appeal, the duty rests upon the appellee to point out the prejudicial error or errors which he contends exist in the record and which he contends justify the ruling made.
2. **Trial: Appeal and Error.** Where a party has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue, he has the right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured.
3. ———: ———. The alleged errors that may be considered in the district court are those which appear in the record of the proceedings which resulted in the verdict and judgment about which complaint is made and which are called to the attention of the trial court by the motion or appropriate pleading.
4. **New Trial: Appeal and Error.** Errors sufficient to cause the granting of a new trial must be errors prejudicial to the rights of the unsuccessful party.
5. **Negligence.** An "unavoidable accident" means when an unexpected catastrophe occurs without any of the parties thereto being to blame for it.
6. **Trial: Appeal and Error.** Where an instruction, although erroneous, is not prejudicially so and cannot by any course of logical reasoning be deemed to have resulted in disadvantage to the complaining party, it is not legal cause or reason for granting a new trial.
7. ———: ———. Instructions should be read and construed together, and, if as a whole they state the law correctly, they will be held sufficient, although one or more of them, considered separately, may be subject to just criticism.

APPEAL from the district court for Lancaster County: HARRY ANKENY, JUDGE. *Reversed and remanded with directions.*

Doyle, Morrison & Doyle, for appellants.

Chambers, Holland, Groth, Dudgeon & Hastings, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

WENKE, J.

This is the second appeal involving this action, the first being Wright v. Lincoln City Lines, Inc., 160 Neb. 714, 71 N. W. 2d 182. It is a tort action by which appellee, Anna M. Wright, plaintiff below, seeks to recover damages because of alleged injuries which she claims to have received in a bus-car accident. A jury, on October 13, 1955, returned a verdict for the appellants, Lincoln City Lines, Inc., and La Verne O. Gieber, defendants below. On her motion therefor being sustained the trial court, without giving any reason for doing so, set aside this verdict, together with the judgment that had been entered thereon, and granted appellee a new trial. Appellants have appealed to this court from that ruling.

The ruling of the trial court on appellee's motion for a new trial is subject to review by this court. Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695, 35 N. W. 2d 772.

When a trial court, as here, gives no reason for its ruling granting a new trial then, on appeal, the duty rests upon the appellee to point out the prejudicial error or errors which she contends exist in the record and which she contends justify the ruling made. Greenberg v. Fireman's Fund Ins. Co., *supra.*

Appellee has endeavored to meet the foregoing. However, before discussing the errors she has assigned as

justifying the trial court's ruling we will set forth a few basic principles applicable thereto.

"The purpose of a new trial is to enable the court to correct errors that have occurred in the conduct of the trial." Greenberg v. Fireman's Fund Ins. Co., *supra*. See, also, Pongruber v. Patrick, 157 Neb. 799, 61 N. W. 2d 578.

"Where a party has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue, he has the right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured." Greenberg v. Fireman's Fund Ins. Co., *supra*. See, also, In re Estate of Kinsey, 152 Neb. 95, 40 N. W. 2d 526.

"The alleged errors that may be considered in the district court are those which appear in the record of the proceedings which resulted in the verdict and judgment about which complaint is made and which are called to the attention of the trial court by the motion or appropriate pleading." Greenberg v. Fireman's Fund Ins. Co., *supra*.

"Errors sufficient to cause the granting of a new trial must be errors prejudicial to the rights of the unsuccessful party." Greenberg v. Fireman's Fund Ins. Co., *supra*.

"While the trial judge need not give his reason for reaching a decision, the justification of the decision must be one that can be established from the record." Greenberg v. Fireman's Fund Ins. Co., *supra*.

"That rule does not authorize the district court to invade the province of the jury and to set aside the verdict and grant a new trial because the court arrived at a different conclusion than the jury on the evidence that went to the jury." Greenberg v. Fireman's Fund Ins. Co., *supra*. See, also, In re Estate of Kinsey, *supra*.

Appellee contends the verdict of the jury is so manifestly wrong that a review of the record should induce the belief on the part of this court that it must have

been reached through passion, prejudice, mistake, or some means not apparent in the record.

As stated in Olson v. Shellington, 162 Neb. 325, 75 N. W. 2d 709: "The inherent power of the court to grant a new trial is limited to those situations where prejudicial error appears in the record of the proceedings." We, of course, will not set aside a verdict unless it is clearly wrong for if the evidence is such in a tort action that different minds may reasonably draw different conclusions therefrom with reference to whether or not negligence exists sufficient to create liability, then such issue is for a jury to decide.

The accident involved happened about 7:30 a.m. on Tuesday, November 3, 1953, just after appellee had entered a bus of the appellant Lincoln City Lines, Inc., as a fare-paying passenger. Appellant La Verne O. Gieber, the driver of the bus, was at the time an employee of the appellant Lincoln City Lines, Inc., and engaged in the performance of his duties as such. Appellee entered the bus where it had stopped to receive passengers at the curb on the south side of N Street just immediately west of the intersection of Thirteenth and N Streets in the city of Lincoln. While she was still standing in the bus, near the front end thereof, talking to the driver about how to get her to her destination he started it forward. After the front end of the bus had reached a point about one-third of the distance into the intersection the left front thereof was hit by the rear part of the right rear fender of a 1937 V-8 2-door Ford sedan being driven by one Le Roy S. Miller, the owner thereof. The appellee was thrown against the meter machine for fares, which was located in the front end of the bus. As a result of being thrown against this machine she claims to have been severely injured and seeks to recover damages therefor.

Miller was originally made a party to this action, which was filed on November 20, 1953. Thereafter, on December 7, 1953, appellee dismissed the action as to

him with prejudice. Miller was, just before the accident, driving east on N Street. Admittedly he turned south at the intersection thereof with Thirteenth Street, intending to go south on Thirteenth Street. In doing so his car struck the bus. In her original petition appellee alleged Miller was guilty of negligence, proximately causing her injuries, in the following respects:

"(a) He failed and neglected to keep a proper lookout for other traffic about to enter said intersection and particularly the bus of the Lincoln City Lines, Inc.

"(b) He failed and neglected to determine that a right hand turn could be made in safety.

"(c) He failed and neglected to have his said automobile under reasonable control."

In our opinion on the first appeal of this case, reported as Wright v. Lincoln City Lines, Inc., *supra,* we held, because of these allegations being admitted as true in appellants' answer, they were judicial admissions of which appellants could take advantage and thus limit the issues on the next trial. See, also, Barkalow Bros. Co. v. English, 159 Neb. 407, 67 N. W. 2d 336, as to what are judicial admissions and the legal effect thereof. This the trial court did by its instruction No. 6. Therein it advised the jury: "The defendants have admitted said allegations (hereinbefore set forth) as true in their answer so in your deliberations you will consider said allegations as established and true."

In that same answer the appellants alleged that the foregoing acts of negligence on the part of Miller "were *the* proximate cause of the accident and the resulting injuries, if any, to the plaintiff." (Emphasis ours.) Appellant Gieber, upon whose conduct the liability, if any, of both appellants rests, testified that the traffic light at Thirteenth and N Streets was green for traffic to proceed east on N Street when he started the bus and slowly pulled away from the curb; that before he did so he looked in his rear-view mirror and saw no traffic coming from the west on N Street; that as he started

he pulled away from the curb and out into the south lane of the two lanes for eastbound traffic on N Street he gave a signal with his left hand of his intention to do so; that the bus had reached a point where it was some 3 or 4 feet from the north line of this lane and some 25 or 30 feet from where it started and was going about 3 or 4 miles an hour when he saw a car that was coming from the west on N Street suddenly turn south in front of the bus he was driving; that he applied his brakes; that the bus was stopped when the rear part of the right rear fender of that car (Miller's) hit the left end of the bumper fastened to the front of the bus, causing part of the bumper to break off; that the bus was then about one-third of the way into the intersection; and that the car driven by Miller had turned south from the inner or farthest north lane of the two lanes for eastbound traffic on N Street. If the jurors believed this testimony of appellant Gieber, which they had a right to do, certainly they could find he was without fault and that Miller's conduct was the sole proximate cause of the accident that resulted in appellee's alleged injuries. Under this situation we cannot say the jury was clearly wrong, in fact, we think the evidence adduced fully supports the verdict rendered.

We come then to appellee's second contention as to why the trial court was justified in granting her a new trial. She contends instruction No. 5, given by the trial court upon its own motion, was prejudicially erroneous because it injected into the case the issue of unavoidable accident, which was neither pleaded nor proved by the evidence.

"The charge of the trial court to the jury should be confined to the issues presented by the pleadings and supported by evidence." Perrine v. Hokser, 158 Neb. 190, 62 N. W. 2d 677.

An "unavoidable accident" means when an unexpected catastrophe occurs without any of the parties thereto being to blame for it. See, McClarren v. Buck,

343 Mich. 300, 72 N. W. 2d 31; Hicks v. Brown, 136 Tex. 399, 151 S. W. 2d 790.

In McClarren v. Buck, *supra,* the court held: "Under the facts in this case 1 or both of the drivers of the colliding cars were guilty of negligence. Under such circumstances it was error to give the quoted instruction (the issue of unavoidable accident) to the jury."

And in Hicks v. Brown, *supra,* the court held: "* * * if the evidence does not raise the issue that something other than the negligence of one of the parties caused the injuries, then it does not raise the issue of unavoidable acident."

Here Miller, the driver of the car, was admittedly guilty of negligence. Under such a situation it would have been error for the trial court to have submitted the issue of an "unavoidable accident." But, of course, every error is not necessarily prejudicial. See In re Estate of Kinsey, *supra.* As stated therein: "Where an instruction, although erroneous, is not prejudicially so and cannot by any course of logical reasoning be deemed to have resulted in disadvantage to the complaining party, it is not legal cause or reason for granting a new trial."

But let us examine instruction No. 5 given by the trial court to see if it submits the issue of "unavoidable accident" as appellee contends. It is as follows: "The fact that an accident occurred or the fact that the plaintiff may have received personal injuries, either or both, taken alone without other evidence, facts, and circumstances, it (is) no evidence of negligence. When accidents happen as incidents to reasonable use and care, the law affords no redress. If the injuries of the plaintiff were not caused by negligence of the defendants, the plaintiff would not be entitled to recover therefor."

The first sentence of instruction No. 5 is an informative statement to the jury advising it of the fact that merely because an accident has happened or the plaintiff may have received personal injuries, or both, is not in and of itself evidence of negligence which, by its in-

struction No. 7, the trial court had properly placed on appellee to prove in order to recover. This is a correct statement of the law and one that should usually be given juries when recovery is sought in automobile accident cases.

The second sentence has particular application here because of appellant Gieber's testimony as to how the accident happened. This sentence relates to and is in line with that part of instruction No. 10 wherein the jury was advised that: "But if you find that the defendants were not negligent, or that the sole proximate cause of the plaintiff's injuries was the negligence of LeRoy S. Miller, then your verdict will be for the defendants."

We come then to the last sentence of instruction No. 5. This sentence relates to and is in line with that part of the trial court's instruction No. 7 wherein it properly placed the burden on appellee to prove, by a preponderance of the evidence, appellants' negligence. It reads, in this respect, as follows: "If the evidence upon any one or more of the above three propositions (one of which relates to negligence) is evenly balanced or preponderates in favor of the defendants, then in your verdict you will find for the defendants." Appellee was also fully protected in this respect by instruction No. 12 given by the court. It provides as follows: "* * * it (appellant Lincoln City Lines, Inc.) is liable for the slightest negligence proximately causing injury to the passenger."

We do not think instruction No. 5 submitted the issue of "unavoidable accident." We do think, along with all the instructions, it fairly and fully submitted the issues presented by the pleadings to the jury which find support in the evidence. By its instruction No. 4 the trial court so advised the jury. This instruction is as follows: "You are instructed that it is your duty to consider these instructions as a whole."

As stated in Peake v. Omaha Cold Storage Co., 158 Neb. 676, 64 N. W. 2d 470: "Instructions are to be con-

sidered together, to the end that they may be properly understood, and, if as a whole they fairly state the law applicable to the evidence when so construed, error cannot be predicated on the giving thereof."

And as stated in Brown v. Chicago, B. & Q. Ry. Co., 88 Neb. 604, 130 N. W. 265: "Instructions should be read and construed together, and, if as a whole they state the law correctly, they will be held sufficient, although one or more of them, considered separately, may be subject to just criticism." See, also, Boesen v. Omaha Street Ry. Co., 83 Neb. 378, 119 N. W. 771.

We do not think instruction No. 5 given by the court is erroneous in any respect and consequently could not be prejudicial. It, with the other instructions, fairly presented to the jury the issues pleaded which find support in the evidence.

In view of what we have herein said we find the trial court was in error in setting aside the jury's verdict, together with the judgment entered thereon, and in granting appellee a new trial. We therefore reverse its action doing so with directions that the verdict be reinstated and that proper judgment be entered thereon dismissing appellee's action. All costs are to be taxed to appellee.

REVERSED AND REMANDED WITH DIRECTIONS.

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, A CORPORATION, APPELLANT, V. CITY OF RANDOLPH, A MUNICIPAL CORPORATION, ET AL., APPELLEES.

81 N. W. 2d 159

Filed February 8, 1957. No. 34068.

1. **Municipal Corporations: Taxation.** The legislative power and authority delegated to a city to construct local improvements and levy assessments for payment thereof is to be strictly construed and every reasonable doubt as to the extent or limitation of

such power and authority is resolved against the city and in favor of the taxpayer.

2. ———: ———. The streets of a city of the second class or village can be paved and so paid for only by legally following one of the three factually applicable methods provided in sections 17-510 to 17-512, R. R. S. 1943.
3. ———: ———. The power of a city council to make the improvements provided for in sections 17-509, 17-510, 17-511, and 17-512, R. R. S. 1943, is circumscribed by the statute, and unless the city council conforms to one of the three prescribed methods, it is without power to lawfully bind property to pay for such improvements.
4. ———: ———. The methods prescribed by sections 17-509 to 17-512, R. R. S. 1943, granting to cities of the second class and villages power to pave, gravel, and improve streets are mandatory and jurisdictional, and unless the governing boards of such municipalities act within one of the three prescribed methods, no valid assessment can be made against property to pay the costs of such improvement.
5. ———: ———. The publications and notices provided for in section 17-511, R. R. S. 1943, are mandatory and jurisdictional steps without which an ordinance never becomes effective.
6. ———: ———. If the applicable law prescribes the mode of exercising the power, the mode prescribed must be followed, or the assessment will be void.
7. ———: ———. Special assessments made upon property without compliance with jurisdictional requirements are void as distinguished from irregular.
8. ———: ———. Section 17-509, R. R. S. 1943, is subject to the limitation of power that none of the improvements shall be ordered except as provided in sections 17-510 to 17-512, R. R. S. 1943.
9. ———: ———. The power to construct improvements and levy assessments for benefits is a power limited to and must be exercised within the district created.
10. ———: ———. When a party attacks a paving assessment for the reason that it is illegal, or for an unauthorized purpose, the burden is on him to prove the invalidity of the assessment, or that it was for an unauthorized purpose.

APPEAL from the district court for Cedar County: LYLE E. JACKSON, JUDGE. *Reversed and remanded with directions.*

Neely, Otis & Neely, for appellant.

Joseph G. Rodgers, Van Pelt, Marti & O'Gara, and *Warren K. Dalton,* for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

SIMMONS, C. J.

This is an action brought to secure an adjudication that a special assessment for paving, levied by the defendant city of Randolph against plaintiff's property, is null and void and is not a lien thereon.

Plaintiff seeks to enjoin the collection of the assessment; to cancel it of record; and to quiet its title to property against the special assessment.

The special assessment was levied upon that part of plaintiff's right-of-way "lying and being within the boundaries of Paving District #4, Randolph, Nebraska."

The defendant city is a city of the second class. The county treasurer is also a defendant. The issues presented here are between the plaintiff and the city. They will accordingly be referred to as plaintiff and city.

The trial court entered judgment for the defendants. Plaintiff appeals. We reverse the judgment of the trial court and remand the cause with directions to render judgment in accord with this opinion.

The history of the proceedings was introduced in evidence by stipulation and furnishes the fact evidence involved.

Preliminary to a statement of the factual situation, it may be well to point out that the general powers of the city to make the improvements here involved are set out in section 17-509, R. R. S. 1943, subject, however, to the proviso "that none of the improvements hereinbefore named shall be ordered except as provided in sections 17-510 to 17-512." Those sections provide:

"Whenever a petition signed by sixty per cent of the resident owners, owning property directly abutting upon the street, streets, alley, alleys, public way or public grounds proposed to be improved, shall be presented and

filed with the city clerk or village clerk, petitioning therefor, the governing body shall *by ordinance* create a paving, graveling or other improvement *district or districts,* and shall cause such work to be done or such improvement to be made, and shall contract therefor, and shall levy assessments on the lots and parcels of land abutting on or adjacent to such street, streets, alley or alleys especially benefited thereby *in such district* in proportion to such benefits, to pay the cost of such improvement." (Emphasis supplied.) § 17-510, R. R. S. 1943.

"Whenever the governing body shall deem it necessary to make any of the improvements named in section 17-509, said governing body shall *by ordinance* create paving, graveling or *other improvement district or districts,* and after the passage, approval and publication of such ordinance, shall publish notice of the creation of any such district or districts for six days in a legal newspaper of the city or village, if a daily newspaper, or for two consecutive weeks, if the same be a weekly newspaper. If a majority of the resident owners of the property directly abutting on the street, streets, alley or alleys to be improved, shall file with the city clerk or the village clerk within twenty days after the first publication of said notice, written objections to the creation of such district or districts, said improvement shall not be made as provided in said ordinance; but said ordinance shall be repealed. If said objections are not filed against the *district* in the time and manner aforesaid, the governing body shall forthwith cause such work to be done or such improvement to be made, and shall contract therefor, and shall levy assessments on the lots and parcels of land abutting on or adjacent to such street, streets, alley or alleys especially benefited thereby *in such district* in proportion to such benefits, to pay the cost of such improvement." (Emphasis supplied.) § 17-511, R. R. S. 1943.

"The council or board of trustees shall have power by a three-fourths vote of all members of such council or

board of trustees to enact *an ordinance* creating a paving, graveling or other improvement district, and to order such work to be done without petition upon any main thoroughfare that connects with or forms a part of the state highway system, and shall contract therefor, and shall levy assessments on the lots and parcels of land abutting on or adjacent to such street, alley or alleys, especially benefited thereby *in such district* in proportion to such benefits, to pay the cost of such improvement." (Emphasis supplied.) § 17-512, R. R. S. 1943.

There is no contention here that any of the procedures involved in this litigation purport to rest on the authority of section 17-512, R. R. S. 1943.

We state first in chronological summary the proceedings here recited. When necessary we shall later refer more in detail to particular matters.

We shall refer to the council meaning the governing body of the city, including the mayor.

The first proceeding rests upon a petition for paving on five named streets. This was presented on July 19, 1951, to a special meeting of the council and found sufficient. Ordinance No. 301 creating Street Improvement District No. 101 was passed and published. This is a proceeding under section 17-510, R. R. S. 1943.

On October 2, 1951, the city created Street Improvement District No. 104 by Ordinance No. 302. This was a proceeding under section 17-511, R. R. S. 1943. It provided for the paving of one street. This district is not directly involved in this litigation except as it will be necessary to refer to it as a part of the description of later action taken by the council.

On October 12, 1951, the council adopted Ordinance No. 305 creating Street Improvement District No. 106. This action was taken under the authority of section 17-511, R. R. S. 1943. The ordinance was published on October 18, 1951, and simultaneously the notice of the creation of the district was published. This proceeding

is directly challenged here by the plaintiff on the ground that the notice of the creation of the district must be given "*after* the passage, approval and publication of such ordinance." (Emphasis supplied.)

On November 6, 1951, pursuant to a petition, the council passed Ordinance No. 306 creating Street Improvement District No. 107. This related to one street. It was a proceeding under the authority of section 17-510, R. R. S. 1943.

Also on November 6, 1951, pursuant to a petition, the council passed Ordinance No. 307 creating Street Improvement District No. 108. This was a proceeding under the authority of section 17-510, R. R. S. 1943. The plaintiff contends that property described in the petition was, in part, not actually paved.

On December 19, 1951, at a special meeting of the council a *resolution* was passed consisting of two sections.

Section 1 provided that District No. 104 be designated as Street Improvement District No. 2 and thereafter in all proceedings relative thereto that it be referred to as Street Improvement District No. 2. This district is not involved in the assessment here in litigation.

Section 2 provided: "That Street Improvement District designated as No. 101 as set out in Ordinance No. 301; that Street Improvement District designated as No. 106 as set out in Ordinance No. 305; that Street Improvement District designated as No. 107 as set out in Ordinance No. 306; that Street Improvement District designated as No. 108 as set out in Ordinance No. 307 be combined and be known as Street Improvement District No. 4 and hereafter in all proceedings relative thereto be referred to as Street Improvement District No. 4."

We shall hereafter refer to these street improvement districts by use of the word District and its number.

At the same meeting the council adopted a resolution approving plans and specifications for the paving of streets and an estimate of the cost of construction in Districts 2 and 4. Also at the same meeting the council

approved a notice to bidders which referred to the construction of paving and work incidental thereto in Districts 2 and 4. This notice was published.

On January 14, 1952, at a special meeting of the council, bids were opened and tabulated. A resolution was passed accepting the bid of one bidder as to both Districts 2 and 4 and authorizing a contract for the construction of paving and incidental work in Districts 2 and 4.

On February 5, 1952, the council at a regular meeting approved the execution of the contract and the performance bond of the contractor. Here again the reference is to Districts 2 and 4.

On June 11, 1952, the engineers submitted a letter to the mayor and council in which they certified that the construction of pavement and work incidental thereto in Districts 2 and 4 had been completed according to contract, and set out the costs allocated to the two districts.

On June 12, 1952, the council met and enacted an ordinance purporting to review and ratify prior proceedings and particularly ratified and approved the resolution of December 19, 1951, that Districts 101, 106, 107, and 108 be combined and known as District 4. This is the first reference we find in this record to Districts 101, 106, 107, and 108 subsequent to the passage of the resolution of December 19, 1951.

At the same time the council passed a resolution finding that Districts 2 and 4 were duly created, that contracts for construction had been let, and that the construction had been completed. By the terms of the resolution the improvements in Districts 2 and 4 were accepted.

On July 1, 1952, the engineers filed a supplemental certificate dividing the costs of construction in Districts 2 and 4 between "District Cost" and "Intersection Cost."

On August 6, 1952, the council by resolution adopted a finding apportioning the costs according to the engineers' statement of July 1, 1952, changing "District

Cost" to "Opposite abutting property" costs in Districts 2 and 4. It then in the resolution called a special meeting for September 5, 1952, for the purpose of sitting as a board of equalization and levying special assessments. A notice of hearing of special assessments was published beginning August 7, 1952. This was directed to all persons owning or occupying lots or parcels of land in Districts 2 and 4. The notice further provided: "The outer boundaries of Street Improvement District No. 4 and real estate contained therein and subject to special assessments are set out and described in Ordinance No. 301 which created Street Improvement District No. 101, Ordinance No. 305 which created Street Improvement District No. 106, Ordinance No. 306 which created Street Improvement District No. 107, and Ordinance No. 307 which created Street Improvement District No. 108 of said City as combined and designated as Street Improvement District No. 4 by resolution passed and adopted December 19, 1951, which act was ratified and approved by Ordinance No. 312.

"Said assessments are made to pay for improvements in said Street Improvement District No. 2 and Street Improvement District No. 4."

This is the final reference in these proceedings to Districts 101, 106, 107, and 108.

On September 5, 1952, the council met pursuant to notice "for the purpose of sitting as a Board of Equalization and granting a hearing to all persons interested and levying special assessments to pay for street improvements constructed in Street Improvement Districts Nos. 2 and 4 of said City."

At an adjourned meeting on September 8, 1952, the council by resolution assessed the several lots and parcels of land in Districts 2 and 4 to pay the cost of construction of the improvements. The assessment in "District #4," item 173, was that against the plaintiff's property involved in this action.

On November 7, 1952, the council by ordinance author-

ized the issuance of intersection paving bonds to pay the cost of improving the intersections in Paving Districts Nos. 2 and 4 in said city.

Plaintiff assigns error here as to a number of matters which we do not deem it necessary to state or determine.

Plaintiff likewise assigns error as to the sufficiency of the enactment of some of the ordinances, the publication of notices, and as to the findings made by the council in these procedures. We do not deem it necessary to determine these matters.

We assume, but do not decide, the sufficiency of the proceedings creating Districts 101, 106, 107, and 108.

We consider plaintiff's assignments of error that concern the proceedings subsequent to the creation of the above four districts.

It is apparent that the legality of the assessment here involved depends upon the validity of the organization of District 4 and the steps taken thereafter, all of which were taken with reference to that district, with the exceptions noted above.

On the above assumptions we start with the resolution of December 19, 1951, attempting to combine the four districts into District 4.

In Hurford v. City of Omaha, 4 Neb. 336, we held: "* * * when the statute prescribes a particular mode in which the corporation is to act, it can only act in the mode prescribed. To sanction a contrary doctrine, it seems to me, would place the corporation above the law, and would, to say the least, be fraught with dangerous consequences. * * * the following rules may be laid down as a safe guide in the interpretation of statutes, relating to the question under consideration:

"1. That when the particular provision of the statute relates to some immaterial matter, where compliance is a matter of convenience rather than substance, or where the directions of the statute are given with a view to the proper, orderly, and prompt conduct of busi-

ness merely, the provision may generally be regarded as directory.

"2. When a fair interpretation of the statute, which directs acts or proceedings to be done in a certain way, shows that the legislature intended a compliance with such provision to be essential to the validity of the act or proceeding, or when some antecedent and pre-requisite conditions must exist prior to the exercise of power, or must be performed before certain other powers can be exercised, then the statute must be regarded as mandatory. And under such statutory provisions, the corporation has no election in the matter as to how or when the duties shall be performed, and municipal officers have no option or authority to act differently from the mode particularly prescribed. And if there be manifest irregularity in the proceedings, presumptions are not indulged to sustain such proceedings, or to give new character to that which is seen to be defective, or to supply the place of that which is not apparent.

"3. When the statutory provision relates to acts or proceedings immaterial in themselves, but contains negative terms, either expressed or implied, then such negative terms clearly show a legislative intent to impose a limitation, and therefore the statute becomes imperative, and requires strict performance in the mode or manner prescribed."

We quoted and followed paragraph No. 2 above in Greb v. Hansen, 123 Neb. 426, 243 N. W. 278.

In Hanscom v. City of Omaha, 11 Neb. 37, 7 N. W. 739, we held: "The limitations in a charter upon the power of the mayor and council to impose taxes is one for the protection of the tax payers of the municipality against the abuse of such power by their own agents. * * * Their authority is derived wholly from the statute, and they have no powers except such as are expressly given or are incidentally necessary to carry the same into effect, and their actions in excess of such powers are absolutely null and void."

In Manners v. City of Wahoo, 153 Neb. 437, 45 N. W. 2d 113, construing the statutes here involved, we held: "Powers conferred upon municipal boards by legislative charter will not be extended beyond the plain import of the language used therein. Statutes empowering municipal boards to perform certain functions will be strictly construed, and all doubt will be resolved against the exercise of the power rather than in favor of it."

In Chicago & N. W. Ry. Co. v. City of Omaha, 156 Neb. 705, 57 N. W. 2d 753, we stated this rule: "The general rule in this state in construing applicable statutes is that the legislative power and authority delegated to a city to construct local improvements and levy assessments for payment thereof is to be strictly construed and every reasonable doubt as to the extent or limitation of such power and authority is resolved against the city and in favor of the taxpayer."

In Manners v. City of Wahoo, *supra,* we held that "the streets of a city of the second class or village can be paved and so paid for only by legally following one of the three factually applicable methods provided in" sections 17-510 to 17-512, R. R. S. 1943.

Authority for the resolution of December 19, 1951, cannot be bottomed upon the provisions of section 17-510, R. R. S. 1943, for that requires that the procedure be initiated by a petition of resident owners.

The authority for the resolution then, if it exists, must be found in section 17-511, R. R. S. 1943. The resolution purports to combine four districts into one district. There is no language in the section that directly or by implication authorizes the creation of a district in that manner.

We construed these particular provisions of the statute in Musser v. Village of Rushville, 122 Neb. 128, 239 N. W. 642, and there held: "The power of the board to make such improvements is circumscribed by the statute, and unless the board conforms to one of the three prescribed methods, they are without power to lawfully bind

property to pay for such improvements. It evidently was not the purpose of the statute to grant unlimited and unrestricted power to the city councils and boards of trustees to improve streets."

In the syllabus it is stated: "The methods prescribed by section 17-432, Comp. St. 1929, granting to cities of the second class and villages power to pave, gravel and improve streets are mandatory and jurisdictional, and unless the governing boards of such municipalities act within one of the three prescribed methods, no valid assessment can be made against property to pay the costs of such improvement."

It necessarily follows that what the council attempted to do by the resolution of December 19, 1951, was an act in excess of the city's powers and was null and void.

But that is not the only defect in this proceeding. Sections 17-510 and 17-511, R. R. S. 1943, provide that the governing body "shall by ordinance" create a district or districts. The mandatory expression is used. Section 17-512, R. R. S. 1943, grants powers to "enact an ordinance" creating a district. Section 17-524, R. R. S. 1943, provides that assessments made under the provisions of sections 17-509 to 17-523 shall be made "by a resolution." The Legislature clearly distinguished between the use of an ordinance in the creating of a district and the use of a resolution in the making of an assessment. There is involved here not a mere dictionary distinction in the definition of words. The distinction is a difference of substance.

Section 17-614, R. R. S. 1943, provides that: "All ordinances and resolutions, * * * shall require for their passage or adoption the concurrence of a majority of all members elected to the council * * *." It then proceeds to more detailed requirements for the adoption of ordinances of a general or permanent nature.

Section 17-613, R. R. S. 1943, provides that: "All ordinances of a general nature shall, before they take effect,

be published * * *," and the requirements as to publication are set out.

Returning now to section 17-511, R. R. S. 1943, the Legislature not only provided for the creation of a district "by ordinance" but further provided that "after the passage, approval and publication of such ordinance," notice of the creation of the district should be published. Here again is a distinct legislative recognition that an ordinance is required.

There are other reasons why the resolution of December 19, 1951, cannot be held to be the equivalent of the ordinance which the statute requires. Section 17-614, R. R. S. 1943, provides in part: "An ordinance shall contain no subject which shall not be clearly expressed in its title, * * *."

Construing this provision in Gembler v. City of Seward, 136 Neb. 196, 285 N. W. 542, we held: "Where the title indicates the subject of the proposed ordinance, the essential requirements of the statutory language quoted have been met, even though more appropriate language might have been employed therein." The resolution here involved had no title.

Even were we to hold, which we do not, that the resolution was the equivalent of the statutory requirement of an ordinance, the procedure followed does not meet the requirements of section 17-511, R. R. S. 1943, so as to give validity to the creation of District 4. The section requires "passage, approval and publication of such ordinance." There is no record here of any publication of the resolution. We find no statute that requires the publication of a resolution. The statute further requires that notice of the creation of the district be published. There is no record here of any publication of such a notice.

In Freeman v. City of Neligh, 155 Neb. 651, 53 N. W. 2d 67, we held that the publications and notices provided for in section 17-511, R. R. S. 1943, are mandatory and jurisdictional steps without which an ordinance never becomes effective. It necessarily follows that the reso-

lution of December 19, 1951, insofar as it purported to create District 4 was null and void.

It was apparently the thought of the council that the creation of District 4 by combining the independently created and existing Districts 101, 106, 107, and 108, furnished the jurisdictional steps required for the new combined district; or stated otherwise, that the new district retained the independent characteristics of its component districts. No procedures were thereafter taken that were bottomed upon the existence of any district other than District 4.

We need not pursue that reasoning. Obviously, at least, the intent of the resolution was to revise and amend the ordinances creating Districts 101, 106, 107, and 108. The ordinances are each directly referred to in the resolution.

Section 17-614, R. R. S. 1943, further provides: "* * * and no ordinance or section thereof shall be revised or amended unless the new ordinance contain the entire ordinance or section as revised or amended, and the ordinance or section so amended shall be repealed." It does not appear that any attempt was made here to meet the requirements of this section.

Subject to the assumption in which we indulged earlier in this opinion, this record shows that the city created four independent districts and thereafter took no further legally valid action based on those districts. The city then by a null and void resolution attempted to create District 4. Thereafter it published notice to bidders, let a contract, accepted the construction, sat as a board of equalization, and levied assessments on plaintiff's property. All of these latter proceedings rest upon the foundation of the null and void resolution and fall with it.

In Besack v. City of Beatrice, 154 Neb. 142, 47 N. W. 2d 356, we held by quote of authority: "If the applicable law prescribes the mode of exercising the power, the mode prescribed must be followed, or the assess-

ment will be void; * * *." And we later held: "* * * special assessments made upon property without compliance with jurisdictional requirements are void as distinguished from irregular, and the owner of such property is not estopped to deny validity of the assessment."

In Fulton v. City of Lincoln, 9 Neb. 358, 2 N. W. 724, with reference to an improvement statute we held: "The council is authorized to act on the subject, and the manner of its acting is clearly prescribed—not by enacting by-laws, making regulations, or passing resolutions, but by enacting ordinances, and nothing is left to be construed by the analogies of state legislation."

In Lincoln Street Ry. Co. v. City of Lincoln, 61 Neb. 109, 84 N. W. 802, we held: "Where the method for exercising the power conferred by statute upon municipal corporations is specially prescribed, that method must be followed in order to validate the action taken thereunder; but where no particular method for the exercise of the power is specified, the city authorities may act by resolution or other appropriate manner, and such action will be as effectual as it would be by ordinance for the same purpose."

It may be well to point out here that the requirement that these steps be taken by ordinance came into the statute in amendments largely rewriting the provisions in 1927. See Laws 1927, c. 42, p. 176.

The city argues here that it had authority under the statutes to create the improvement districts and that when the ordinances creating the four districts were adopted it was possessed of the power to make the improvements and assess the benefits.

As we pointed out in Manners v. City of Wahoo, *supra,* section 17-509, R. R. S. 1943, is subject to the "limitation of power" that none of the improvements shall be ordered except as provided in sections 17-510 to 17-512, R. R. S. 1943. Clearly by both sections 17-510 and 17-511, R. R. S. 1943, the power to cause the work to be done, to let contracts, and to levy assessments for benefits is

limited to "such district" as has been validly created. The power to construct improvements and levy assessments for benefits is a power limited to and must be exercised within the district created.

Such is the clear import of our holding in Besack v. City of Beatrice, *supra.*

The city argues here that what it did was merely to provide for the construction of the work in four properly created districts under a single contract and that the statute does not require separate contracts for each improvement district. The city's contention as to what it did here is an obvious understatement. The answer to the contention is that the statutes do not in terms or by implication authorize combined contracts. The test, under the authorities hereinbefore cited, is: Does the affirmative power appear? No such affirmative power is shown nor is it contended that it exists.

The city further argues that no injury to the plaintiff is shown to have resulted. That obviously is not the test.

The city contends that what was done here was at most an irregularity.

The contention that what occurred here was an irregularity is answered in our decision in Besack v. City of Beatrice, *supra,* quoted above.

The city argues that the ordinance enacted June 12, 1952, at the end of these proceedings ratified the defects in the procedure followed here.

The argument proceeds on this basis: The city had implemented its statutory power and had the authority and duty to make the improvements by the organization of Districts 101, 106, 107, and 108; it made the improvements it had the power to do; its procedures were mere irregularities; and having the power to do what it did do, then its act done by resolution is subject to ratification by the ordinance subsequent to the making of the improvements.

The difficulty with this argument is that it starts on

the foundation of four districts created by ordinance and then relies on improvements made and assessments levied which rest on one district created by resolution.

We have assumed, but not decided, that Districts 101, 106, 107, and 108 were validly organized. The city did not proceed in the exercise of any power it had with reference to those districts. It proceeded to make improvements and levy assessments with reference to a district the organization of which was null and void.

We have been unable to determine, with any certainty, in which one of Districts 101, 106, 107, or 108 plaintiff's property would have been assessable had the improvements been made within the framework of the authority of those districts. There is no uncertainty about the fact that plaintiff's property was assessed for benefits in District 4, and that district only.

This argument is tantamount to saying that the city could proceed to make improvements without compliance with the jurisdictional requirements of the statute as to the creation of a valid district, and after the improvements were completed it will be sufficient then to enact an ordinance to implement its power. In short, that it can do at the end of the proceedings that which the statute makes the first jurisdictional requirement to create the power to improve and assess.

Paraphrasing language used in Gutta Percha & Rubber Mfg. Co. v. Village of Ogallala, 40 Neb. 775, 59 N. W. 513, 42 Am. S. R. 696, approved in City of Plattsmouth v. Murphy, 74 Neb. 749, 105 N. W. 293, if ratification is sanctioned upon a proceeding of this kind, legislative restriction upon municipal corporation powers is in vain.

In the beginning of its brief the city called our attention to the rule stated in Chicago & N. W. Ry. Co. v. City of Omaha, *supra,* that: "When a party attacks a paving assessment for the reason that it is illegal, or for an unauthorized purpose, the burden is on him to

prove the invalidity of the assessment, or that it was for an unauthorized purpose."

We revert to it in closing and hold that plaintiff has proven the invalidity of the assessment involved.

The judgment of the trial court is reversed and the cause remanded with directions to enter judgment for the plaintiff in accord with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

CLARA C. TIMMERMAN, APPELLEE, V. JOSEPH D. TIMMERMAN, APPELLANT.
81 N. W. 2d 135

Filed February 8, 1957. No. 34070.

1. **Children Born Out of Wedlock.** In an action the sole purpose of which is to have determined the paternity of a child born out of wedlock, the proceeding must be in accordance with the provisions of section 13-106 or 13-113, R. R. S. 1943.
2. **Statutes.** By statute so much of the common law of England as is applicable and not inconsistent with the Constitution of the United States, with the organic law of this state, or with any law passed or to be passed by the Legislature of this state, has been adopted and declared to be law within the State of Nebraska.
3. **Children Born Out of Wedlock.** In this state, a common-law jurisdiction, an action for the purpose of legitimating or determining the paternity of a child born out of wedlock and obtaining support and maintenance for such child depends upon statutory authority for its maintenance.
4. ———. The procedure contemplated by sections 13-106 and 13-113, R. R. S. 1943, does not preclude a court of equity, in a case where a sentence or decree of nullity of a marriage has been rendered, from determining the paternity of children born of a void marriage, and making an award for care, custody, and maintenance of such children.
5. **Divorce.** Jurisdiction of the court in matters relating to divorce and alimony is given by the statute and every power exercised by the court with reference thereto must look for its source in the statute or it does not exist.
6. **Courts.** Courts of general jurisdiction have the inherent power to do all things necessary for the proper administration of

justice and equity within the scope of their jurisdiction.

7. **Children Born Out of Wedlock.** The quality of proof which is sufficient to prove paternity of a child born out of wedlock under sections 13-106 and 13-113, R. R. S. 1943, is sufficient for that purpose in a court of equity in an action wherein the nullity of a marriage has been decreed.
8. **Appeal and Error.** In an equity case appealed to this court, if it is desired to review erroneous rulings of the trial court as to reception of evidence, a motion for new trial must be filed and overruled in the district court.
9. **Divorce.** An allowance of attorney's fees in an action for divorce is dependent upon the existence of the marriage relation.
10. **Attorney and Client.** It is the practice in this state to allow the recovery of attorney's fees only in such cases as are provided for by statute, or where the uniform course of procedure has been to allow such recovery.

APPEAL from the district court for Lincoln County: ISAAC J. NISLEY, JUDGE. *Affirmed in part, and in part reversed and remanded with directions.*

Baskins & Baskins, for appellant.

Beatty, Clarke, Murphy & Morgan, Donald W. Pederson, and *Frank E. Piccolo, Jr.*, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, WENKE, and BOSLAUGH, JJ.

YEAGER, J.

This is an action by Clara C. Timmerman, plaintiff and appellee, against Joseph D. Timmerman, defendant and appellant. The action was commenced by a petition filed by plaintiff on June 29, 1955, wherein she alleged a marriage between the parties and that a child was born of the marriage. She prayed for a divorce, custody of the child, provision for support of the child, alimony for herself, suit money, and attorney's fees. Service of process was duly made upon the defendant.

Thereafter on July 5 and 6, 1955, pursuant to notice, a hearing was had upon an application of plaintiff for temporary allowances for alimony, child support, attorney's fees, and suit money, at the conclusion of which

an award of $100 a month for temporary alimony and child support was made. A temporary attorney's fee of $50 was allowed. The journal entry was filed July 8, 1955.

Thereafter on March 15, 1956, the defendant filed an answer and cross-petition. No point is made that it was out of time under the statute.

By the answer the defendant admitted that a marriage ceremony had been performed and that a child had been born to plaintiff, but in effect denied the validity of the marriage. The further answer was a general denial.

By the cross-petition he specifically denied the validity of the marriage. He prayed that the marriage be declared null and void and he further prayed that the custodial right of the child be determined.

On March 23, 1956, the defendant filed a request for the vacation of the order of July 6, 1955, on the ground substantially that it was without authority of law since the parties were never legally married. A hearing on this motion was set down for March 30, 1956.

Apparently the stated hearing was not had, but on April 4, 1956, the plaintiff filed a written answer to the motion to set aside the previous order. By this answer the plaintiff effectually admitted the invalidity of the marriage. She did so by admitting that the child was born out of wedlock, as follows: "Plaintiff further alleges that said child is a 'child born out of wedlock' within the meaning of Chapter 13, R. R. S., Nebraska, 1954, as amended, * * *." She alleged that the defendant had acknowledged the child. She prayed for an order and decree declaring the defendant to be the father of the child as a "child born out of wedlock" within the meaning of the statute, and that he be required to pay an amount to be fixed for support and maintenance together with suit money and attorney's fees.

Thereafter the defendant filed a dismissal of his cross-

petition. No responsive pleading was ever filed to the answer or cross-petition of the defendant.

On April 11, 1956, the defendant filed a motion for summary judgment dismissing the petition of the plaintiff for the reason that the marriage of the parties was null and void and therefore no divorce action for its dissolution could be maintained. Notice of hearing upon the motion was duly given. Notice was also given of the evidence the defendant intended to produce to support the motion.

By recital in a journal entry filed May 24, 1956, it appears that a hearing at which evidence was taken was had on April 4, 1956, on the motion of the defendant to vacate the order of July 6, 1955. Hearing was continued.

By recital in the same journal entry it appears that on April 21, 1956, a hearing was had on defendant's motion for summary judgment. The matter was taken under advisement.

Again by recital in the same journal entry it appears that on April 26, 1956, the motion for summary judgment was overruled and a finding was made that there were "issues between the parties in this action which should be tried and determined by the court."

Also by recital in this journal entry it appears that on April 28, 1956, the court on motion of the defendant set the case for trial on May 11, 1956. The court at that time on its own motion assigned the following issues to be tried: (1) Custody of child, (2) support of child, and (3) paternity of child. The pleadings were at that time in the condition hereinbefore described and they were not thereafter amended.

A hearing was had on that date the results of which were recited in the journal entry filed on May 24, 1956. The findings to the extent necessary to repeat them here are that the marriage was invalid; that the child in question had been proved to be a child born out of wedlock; and that defendant is the father of said child

within the meaning of Chapter 13, R. R. S. 1943, as amended. The adjudication conformed to the findings and the defendant was ordered to pay $150 a month for the support of the child until the further order of the court, to pay all sums due and delinquent under the order for temporary support, to pay costs of the action, and to pay an attorney's fee of $150. By the decree custody of the child was awarded to the plaintiff. From the adjudication made the defendant has appealed.

The brief of the defendant contains many assignments of error as grounds for reversal, however the basic contention is that this is an action for divorce, and it having been shown that a valid marriage did not exist, the court was without right to try and determine any other issue. Applied to the particular matters upon which an adjudication was made it is the contention of the defendant: (1) That the court was without power to determine in this action that a child born to plaintiff was a child of the defendant born out of wedlock; (2) that the court was without power pendente lite and after it was known that there was no valid marriage to require the defendant to pay for the support for the child; (3) that the court was without power to make a final award for the support of the child; and (4) that the court erroneously assessed the costs of the action and awarded an attorney's fee for plaintiff's attorney.

It appears that the first specification as it has been numbered and stated herein would have to be sustained if this were an independent action to determine the paternity of a child born out of wedlock. The type or types of action for the independent determination of the fatherhood of a child born out of wedlock are special and we deem them to be exclusive. They are found in Chapter 13, R. R. S. 1943. Two types of procedure are provided for by the chapter. One of these is found in section 13-106, R. R. S. 1943.

By this section it is pointed out that paternity may be established by acknowledgment or by a judicial pro-

ceeding. The type of judicial proceeding to establish paternity is by the statute declared to be the one described in the section. The declaratory words in this connection are "a judicial proceeding as hereinafter specified." The proceeding is described as follows: "Such proceeding shall be commenced by a complaint of the mother of the child, * * * which shall set forth the facts of paternity and of nonsupport and shall ask that the father be ordered to provide for the support of the child."

It may not well be said that the action before the district court which is being reviewed here conformed in anywise to the requirements of this section of the statute.

Another type of procedure is provided by sections 13-113 and 13-114, R. R. S. 1943. One of these sections has been amended but this became effective after the filing of the petition in this case.

By section 13-113, R. R. S. 1943, it is provided as follows: "In addition to all other penalties and enforcement devices provided for in sections 13-101 to 13-116, (1) any mother of a child born out of wedlock, * * * may make complaint before any justice of the peace, municipal judge, county judge, or district judge of the State of Nebraska accusing on oath or affirmation any person of being the father of said child." No procedure under this provision was before the district court for consideration in this case.

The chapter of the statutes in question, which was adopted in 1941, is an amendatory substitute for Chapter 9, Compiled Statutes of 1929, which made provision for the support of bastards. This is made clear by the title to the act. Laws 1941, c. 81, p. 322.

The general rule as to legitimating bastards in common-law states as stated in 10 C. J. S., Bastards, § 9, p. 53, is the following: "In common-law jurisdictions the only method of legitimating bastards is by or under a statute, * * *."

In 7 Am. Jur., Bastards, § 52, p. 660, it is said: "According to the early common law of England, children born out of lawful wedlock could not be rendered legitimate by any subsequent act of their parents, but the power of the legislature to legitimate or provide for the legitimation of bastard children has long been recognized both in England and in this country."

The Legislature at its session in 1866 adopted the following which appears now as section 49-101, R. R. S. 1943: "So much of the common law of England as is applicable and not inconsistent with the Constitution of the United States, with the organic law of this state, or with any law passed or to be passed by the Legislature of this state, is adopted and declared to be law within the State of Nebraska."

Chapter 13, R. R. S. 1943, is an act of the Legislature which conflicts with the common-law rule and the power to act under it being statutory it must be strictly construed. Thus for the purpose of solely determining the paternity of a child born out of wedlock, resort may be had only to the remedies provided by the statute.

The question has not been previously passed upon by this court but we are constrained to the view that these provisions are exclusive as to the procedure for the independent determination of the paternity of a child born out of wedlock.

It does not follow however that the court may not, in an action wherein the nullity of a marriage has been decreed, also make provision for the care, custody, and maintenance of an illegitimate child of the parties.

Section 42-311, R. R. S. 1943, provides in part: "Upon pronouncing a sentence or decree of nullity of a marriage * * * the court may make such further decree as it shall deem just and proper concerning the care, custody, and maintenance of the minor children of the parties, and may determine with which of the parents the children or any of them shall remain."

Section 42-312, R. R. S. 1943, gives the court, after

making provision for the care, custody, and maintenance of children, the power to revise or alter the provision so made.

It clearly appears that the district court in this case had the power to determine the question of whether or not the marriage was valid and if found to be invalid to declare it null and void. In truth the defendant by his motion for summary judgment effectually asked the court to so adjudicate.

By the terms of section 42-311, R. R. S. 1943, the court was specifically empowered, in the event that the marriage was decreed to be a nullity, to make provision for the care, custody, and maintenance of any child or children of the parties. It is but a matter of reason and logic to say that the power could not be exercised in the absence of proof of the fact that there was a child or there were children. It is likewise true that proof of paternity could be accomplished by admission of the father.

The question arises, as applied to this case, as follows: Was the court empowered to determine the question of paternity other than by an adjudication made pursuant to section 13-106 or 13-113, R. R. S. 1943, or in other words, was it barred from the full performance of the power granted by section 42-311, R. R. S. 1943, in the absence of evidence of an adjudication made under section 13-106 or 13-113, R. R. S. 1943?

We think that the answer must be that the court had the power to hear evidence and to determine the question of paternity in the absence of evidence of an adjudication under section 13-106 or 13-113, R. R. S. 1943.

Section 42-307, R. R. S. 1943, provides in part: "Suits to annul or affirm a marriage, or for divorce, shall be conducted in the same manner as other suits in courts of equity."

In Harrington v. Grieser, 154 Neb. 685, 48 N. W. 2d 753, the following appears: "Jurisdiction of the court in matters relating to divorce and alimony is given by

the statute and every power exercised by the court with reference thereto must look for its source in the statute or it does not exist.

"Courts of general jurisdiction have the inherent power to do all things necessary for the proper administration of justice and equity within the scope of their jurisdiction."

The matter of the trial of the question of paternity, it is believed, comes within the purview of this declaration of the powers of courts of equity. If it does not it becomes clearly apparent that in an instance such as this the court is barred from a complete exercise of the power specifically granted to it by section 42-311, R. R. S. 1943. Accordingly the holding is that the district court had and properly exercised the power to try and determine the question of whether or not the defendant was the father of the child of plaintiff.

The question to be considered next is that of whether or not there was satisfactory and sufficient evidence to sustain the finding made by the court.

Section 13-109, R. R. S. 1943, defines what may be regarded as satisfactory proof in an action instituted agreeable to the provisions of sections 13-106 and 13-113, R. R. S. 1943, as follows: "A person may state in writing that he is the father of a child or perform acts, such as furnishing of support, which reasonably indicate that he considers himself to be the father of such child, and in such case he shall be considered to have acknowledged the paternity of such child."

No reason is apparent why this quality of evidence should be regarded as insufficient in this case.

On the question of whether or not the evidence was satisfactory or, in other words, whether or not it was sufficient in probative value to sustain the finding that the defendant had acknowledged the paternity of the child, it is pointed out that he testified that he had executed an instrument designating the child as a beneficiary of an insurance policy. This evidence was ob-

jected to at the time but since no motion for new trial was filed the propriety of its admission is not before the court.

The controlling principles in situations such as this are stated as follows in Nemetz v. Nemetz, 147 Neb. 187, 22 N. W. 2d 619:

"In an equity case appealed to this court, if it is desired to review alleged erroneous rulings of the trial court as to the reception of evidence, a motion for a new trial must be filed and overruled in the district court.

"In an equity action where the district court receives evidence over objection and a motion for a new trial is not made and the evidence is here preserved in the bill of exceptions, this court upon trial de novo will consider it and give it whatever probative value it may have in reaching a conclusion upon the fact issues involved." See, also, Rush v. Heinisch, 157 Neb. 545, 60 N. W. 2d 608.

However there was other evidence which was of probative value and of the quality described in section 13-109, R. R. S. 1943. The plaintiff gave testimony, which came within the purview of the section, that the defendant supported and treated the child as his own from the date of his birth, which was September 10, 1954, until April 10 or 20, 1955, when the parties separated; that he has not denied that he is the father; that in the presence of friends, neighbors, and his mother his attitude was that of father; that he came regularly to visit the child and brought gifts; that he has paid some doctor and hospital bills; and that on one occasion he was heard to say to an associate in a business venture: "We have to take our little boy to Grand Island to the doctor."

The plaintiff gave other testimony not within the purview of section 13-109, R. R. S. 1943, that she had gone with plaintiff 2 years before she became pregnant and that she had no access to any other man during that time.

This evidence was sufficient to sustain the finding of the district court that the child in question was a child

of the parties to this action. In the light of this and the analysis of the law which has been made it is concluded that the district court had the power to bind the defendant by an order for the care, custody, and maintenance of this child.

As has been pointed out the court, in this case as an action for divorce, made an allowance for temporary support for the child. The award was for $100 a month payable in installments of $50 each. This order was made as of July 6, 1955. On final disposition of the case the defendant was ordered to make payments of $150 a month until the further order of the court, the first to be paid on May 11, 1956, and the further payments to be made on the 11th day of each succeeding month. An attorney's fee in the amount of $150 was allowed. The defendant was also ordered to pay the difference between the total amount due to the time of the final disposition of the case and the amount which had been paid.

On the award for temporary allowances the record discloses that the defendant had paid $810. This would account for 8 months, or through February 1956, and $10 for March.

The defendant insists that he should not be required to pay the balance on the temporary allowance and that he should not be required to pay the attorney's fee.

As to the question of delinquent allowances it appears that it was proper to require that delinquent allowances should be paid to May 11, 1956. Prior to this date the action was one for divorce but on this date it was judicially determined that there was no valid marriage. The effect of this was to leave the defendant without any binding legal obligation to support the child, since it had not been determined that the defendant was the father of the child.

The allowance of the attorney's fee was clearly erroneous. The right of the court to allow an attorney's fee in an action for divorce is dependent upon the existence

of the marriage relation, and in a case where it is found that the relation does not exist a fee may not be allowed.

In Abramson v. Abramson, 161 Neb. 782, 74 N. W. 2d 919, it was said: "An allowance for counsel fees and suit money is, like an award of alimony, dependent upon the existence of the marriage relation; and if it is denied and the wife fails to refute such denial, her application must be refused owing to her failure to make out a prima facie case."

As to the right of the court in general to allow attorney's fees this court said in State ex rel. Ebke v. Board of Educational Lands & Funds, 159 Neb. 79, 65 N. W. 2d 392: "It is the practice in this state to allow the recovery of attorney's fees and expenses only in such cases as are provided for by statute, or where the uniform course of procedure has been to allow such recovery." See, also, Abramson v. Abramson, *supra.* Attorney's fees in a situation such as this are not allowable under any statute and attention has not been called to any course of procedure under which such an allowance may be made.

As has been made apparent the conclusion has been reached that the district court had the power to make an award for the care, custody, and maintenance of the child. It is concluded however that the evidence is insufficient to sustain the award in the amount rendered. It is apparent that the condition of the child requires more for care and maintenance than would be required for a normal child but the burden imposed should not exceed reasonably proved present and current needs or the probable ability of the defendant to pay.

The evidence in both of these areas is limited and indefinite. The condition of the child has been described and some evidence appears as to what will be necessary to be done to habilitate him. The occupations of the defendant have been designated but no measure of his income has been disclosed. There is nothing to indicate that his income is high or regular.

It appears therefore that the monthly award should be $75 a month instead of $150 a month, payable in monthly installments as is provided in the journal entry of the district court.

The judgment of the district court is affirmed to the extent indicated herein, and reversed also to the extent indicated and the cause is remanded with directions to render a decree accordingly.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

CHAPPELL, J., participating on briefs.

EDWARD E. SANDOMIERSKI, APPELLEE, V. VIRGIL J. FIXEMER, APPELLANT.

81 N. W. 2d 142

Filed February 8, 1957. No. 34071.

1. **Trial: Appeal and Error.** Where it is claimed that an attorney is guilty of misconduct in arguing a case to a jury, it is necessary in order to raise the question on appeal that objection be timely made to the trial court and a ruling had thereon, and that it be made a part of the record and included in a proper bill of exceptions.
2. **Trial.** One may not complain of the misconduct of counsel if with knowledge of such misconduct he does not ask for a mistrial, but consents to take the chances of a favorable verdict.
3. ———. Objections at the close of the argument, to the misconduct of an attorney in arguing a case to a jury, are timely made.
4. ———. Where the argument of counsel is not being fully reported in such a case it is proper practice to call the reporter and make a record of the offending statements. All that is required is that an accurate record be made under the supervision of the court, which will appear in the bill of exceptions.
5. **Trial: Appeal and Error.** The making of statements which have no support in the evidence, in an argument to a jury, which has the effect of informing the jury that the defendant would not have to pay the judgment by inferring that he was indemnified in some manner, is such misconduct of counsel as will ordinarily require a reversal of the judgment.

6. ———: ———. Where it appears from the record that the purpose of improper argument to a jury was calculated to distract its attention from the issues and evidence, and to induce a larger verdict by injecting prejudicial statements, irrespective of the manner or the ingenuity of counsel in accomplishing such purpose, the verdict is not fairly obtained and cannot be sustained.

APPEAL from the district court for Sarpy County: JOHN M. DIERKS, JUDGE. *Reversed and remanded.*

Chambers, Holland, Groth, Dudgeon & Hastings, and *Robert B. Waring,* for appellant.

Doyle, Morrison & Doyle, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, WENKE, and BOSLAUGH, JJ.

CARTER, J.

This is an action to recover for personal injuries and property damage resulting from a collision between plaintiff's automobile and defendant's truck. The jury returned a verdict for plaintiff for $7,500 and judgment was entered thereon. The defendant has appealed.

The petition of the plaintiff alleges that the defendant carelessly and negligently drove his truck off of the traveled portion of the highway and into the rear end of plaintiff's automobile temporarily stopped on the shoulder of the road, thereby damaging plaintiff's automobile and inflicting serious injuries upon the plaintiff. The defendant by his answer admitted negligence on his part and requested that a hearing be had to determine the amount of damages to be assessed against him. The case was tried to determine the amount of damages only.

The defendant assigns as error the misconduct of counsel in his closing argument to the jury and the excessiveness of the verdict.

The record shows that at the close of the arguments made to the jury, and before the jury was instructed

and the case submitted, counsel for the defendant moved for a mistrial because of improper and prejudicial statements made to the jury in plaintiff's closing argument. The record shows that the arguments of counsel were not taken by the court reporter. No objection was made to the improper statements during the argument. At the close of the argument, however, the reporter was called and the alleged improper and prejudicial statements were dictated into the record. The record shows that the trial judge was present during the whole of the argument to the jury. That the alleged statements were made as dictated into the record is not challenged.

The record shows that during the plaintiff's closing argument to the jury his counsel stated: "He (defendant) isn't even interested enough in this lawsuit to sit at the counsel table." Counsel also stated: "* * * also, it is no concern who pays the judgment." He further stated: "It's easy for Bob Waring to go cruising through life in his Cadillac." The motion of the defendant for a mistrial because of the misconduct of counsel was overruled by the trial court.

The plaintiff contends that the objection was not timely made. The rule as announced by this court is that where it is claimed that an attorney is guilty of misconduct in arguing a case to a jury, and it is desired to raise a question on that point for decision in the Supreme Court, it is necessary that objection be made to the trial court at the time and an adverse ruling had thereon, and that the same be made a part of the record by a proper bill of exceptions. Thornton v. Davis, 113 Neb. 529, 204 N. W. 69; Hamblin v. State, 81 Neb. 148, 115 N. W. 850. Alleged misconduct of counsel in argument to a jury cannot be properly shown by affidavit or evidence taken in support of a motion for a new trial, and to preserve such error the statements must be taken by the official court reporter at the trial, together with the objections made thereto and the court's ruling thereon. This is on the theory that one may not com-

plain of the misconduct of counsel if, with the knowledge of such misconduct, he does not ask for a mistrial but consents to take the chances of a favorable verdict. In re Estate of Inda, 146 Neb. 179, 19 N. W. 2d 37; In re Estate of House, 145 Neb. 670, 17 N. W. 2d 883.

Whether or not an objection to the remarks of counsel made in his argument to the jury may properly be made at the close of the argument, or whether it must be done at the very time they are made, does not appear to have been decided previously by this court. We think that, for several reasons, such objection may properly be made at the close of the argument. Our previous decisions indicate that the submission of the case to the jury without objection to such misconduct, and counsel's evident willingness to take his chances on a favorable verdict, constitute a waiver of the misconduct. His objection at the close of the argument and before submission to the jury is in no sense a waiver on any such basis. It could well be that any one improper statement would not constitute prejudicial error, while the cumulative effect of several would give rise to a claim of prejudice. Continued objections by counsel to prejudicial statements of opposing counsel in his argument to the jury could place the former in a less favorable position with the jury, and thus impose an unfortunate consequence upon his client which was actually caused by the wrongful conduct of opposing counsel. This he is not required to do. Attorneys engaged in the trial of cases to a jury know or ought to know the purposes of arguments to juries. When they depart from the legitimate purpose of properly presenting the evidence and the conclusions to be drawn therefrom, they must assume the responsibility for such improper conduct. They are in no position to demand that opposing counsel shall jeopardize his position with the jury by constant objections to their improper conduct. The objection to the remarks of counsel as misconduct was timely made. In Bratt v. Smith, 180 Or. 50, 175 P. 2d

444, the court said: "At the conclusion of the argument of counsel for plaintiff and prior to the giving of the instructions of the court, the defendants on the following morning moved for a mistrial. The trial court apparently was of the opinion that the motion for a mistrial was not timely, but in this conclusion we think it erred. We think the motion was timely." See, also, Weber v. McCarthy, 214 Minn. 76, 7 N. W. 2d 681; 88 C. J. S., Trial, § 196d, p. 387.

It is contended further by the plaintiff that misconduct of counsel may not be properly raised unless the court reporter takes the complete argument. The purpose of the rule that the offending statements shall be taken by the court reporter is that the trial judge shall have an opportunity to make an accurate record before ruling upon the objection and have the same included in the bill of exceptions. The failure of the court reporter to take the oral arguments does not relieve attorneys from the necessity of making proper arguments, nor deprive opposing counsel of the right to make timely objections thereto. It is the duty of the trial court to see to it that oral arguments are properly confined to their purposes, and where objection thereto is made, to see that an accurate record is made for the purpose of making a correct ruling and providing a proper basis for review on appeal. The trial court properly protected the record in the instant case.

The only question at issue in the present case was the amount of the damages. There was no reason whatever for the statements made by counsel to which objection was made, other than to convey the impression to the jury that the defendant had no interest in the case and that someone other than the defendant would pay any judgment entered. This court has repeatedly condemned this sort of argument as prejudicial to the rights of a defendant. The only purpose of the objectionable statements in the present case was to advise the jury that the defendant was indemnified in some manner and

thereby to invite a larger verdict than would otherwise be obtained. We are not able to determine what influence the improper argument had upon the jury, but it was calculated to distract its attention from the real issues and to induce a larger verdict by bringing out matters not proper to be considered. When such is the effect, irrespective of the manner in which it is done or the ingenuity of counsel in avoiding applicable rules, it is error which, if properly preserved, may vitiate the verdict.

In Chicago, B. & Q. R. R. Co. v. Kellogg, 54 Neb. 127, 74 N. W. 454, this court said: "These cases establish that a lawyer charged with the conduct of a case is invested with certain rights and charged with certain duties. It is his duty to use all honorable means to protect his client's interests; and in argument, within the limits of the evidence and the legitimate deductions and inferences to be drawn therefrom, he may not be limited, but may comment on the conduct and credibility of witnesses and parties to the suit. On the other hand, he must act honorably and fairly with the court, opposing counsel, the jury, and the parties to the litigation. But he may not, in his conduct of the case or in his argument to the jury, go outside the record, the evidence and the legitimate inferences deducible therefrom, and ask questions, make statements or arguments for the purpose of misleading and prejudicing the jury; and if he does so, such misconduct, if properly preserved in the record and assigned here, will cause a reversal of the judgment procured."

In Bergendahl v. Rabeler, 131 Neb. 538, 268 N. W. 459, this court had occasion to say: "Complaint is made by the defendant of remarks of counsel for plaintiff in his closing argument to the jury. In that argument counsel for plaintiff said in part: 'I don't want to punish the defendant. A verdict for this girl will not punish him.' This statement, when considered with prior questions and statement of counsel relative to insurance,

could only be construed by the jury as an assurance that some insurance company would pay the amount of the verdict. In its opinion in the case of Standridge v. Martin, 203 Ala. 486, 84 So. 266, the supreme court said, in part: 'There can scarcely be made to a jury a more seductive and insidious suggestion than that a verdict for damages against the defendant before them will be visited, not upon that defendant, but upon some invisible corporation whose business it is to stand for and pay such damages. Such a suggestion, once lodged in the minds of the jury, is almost certain to stick in their consciousness, and to have its effect upon their verdict, regardless of any theoretical exclusion of it by the trial judge.' "

Other cases sustaining this view are: McCornack v. Pickerell, 225 Ia. 1076, 283 N. W. 899; Walden v. Jones, 289 Ky. 395, 158 S. W. 2d 609, 141 A. L. R. 105; Ingerick v. Mess, 63 F. 2d 233.

With reference to the statement "It's easy for Bob Waring to go cruising through life in his Cadillac," it could well be said that prejudicial error did not result under the circumstances of the record before us. But such a reference to an opposing counsel is highly improper and should not be tolerated by the trial judge. While we may be unable to determine the purpose of such a statement in an argument to a jury, we must assume that it was intended to aid the cause of the party on whose behalf it was made. It had nothing whatever to do with the fixing of the amount of damages to be assessed against the defendant. The statement was improper and the trial court should have taken the necessary steps, particularly after objection was made thereto, to correct the error and avoid the probability of any further statements of similar character.

In Ashland Land & Live-Stock Co. v. May, 59 Neb. 735, 82 N. W. 10, this court said: "We have little patience with counsel who deliberately seek to achieve

success by lawless methods; and we do not hesitate, in any case, to deprive them of advantages thus obtained. In the performance of professional duties, counsel should endeavor always to conform their own conduct to the law which they have been commissioned to assist in administering." And in Hall v. Rice, 117 Neb. 813, 223 N. W. 4, 78 A. L. R. 1421, this court after quoting the preceding quotation said: "In the trial of every contested lawsuit, there is abundance of opportunity, growing out of the material facts and circumstances of the case, for the display of extraordinary talent and the exercise of adroitness and finesse without resort to illegitimate methods tending only to arouse the passion and prejudice of the jury. It is of greater importance that the administration of justice be regular and orderly, than that counsel be afforded an opportunity to exhibit their peculiar prowess in the use of questionable methods."

The plaintiff argues that counsel for the defendant went outside the record in their arguments. No objections were made to the argument of the defendant and no record of any such statements appears in this record. It is asserted that the improper statements were retaliatory, but there is nothing in the record to show this to be the fact. The record shows that the trial court overruled defendant's objection to the improper argument of plaintiff's counsel. Consequently, the offending attorney was not reprimanded, the jury was not admonished, nor were other steps taken to secure a fair trial on the issues and evidence before the court. We think the arguments of counsel to which objection was made constitute such misconduct as to require a reversal of the judgment.

We do not pass upon the question of the excessiveness of the verdict. If the verdict is excessive under the evidence, we must assume that it was the result of the misconduct of counsel herein pointed out. It is a situation that is not likely to occur on a retrial of the

case, and for that reason we shall not consider the alleged excessiveness of the verdict on the present appeal.

The judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

CHAPPELL, J., participating on briefs.

GERALD REINMUTH, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

80 N. W. 2d 874

Filed February 8, 1957. No. 34130.

1. **Criminal Law.** Any probative evidence showing a violation of probationary conditions by conduct sufficient to convince the district court that the defendant will not refrain from criminal acts in the future without punishment will sustain the revocation of probation.
2. ———. In a proceeding for revocation of probation, reprehensible conduct being the basis therefor, proof of venue within the meaning of criminal law is not necessary.
3. ———. In a hearing on an application for revocation of probation the court may exercise broad powers of inquiry in determining whether or not the application should be sustained.
4. ———. A witness, including a defendant in a criminal action who has become a witness in his own behalf, may be subjected on cross-examination to interrogation as to previous conviction of felony.

ERROR to the district court for Cheyenne County: ISAAC J. NISLEY, JUDGE. *Affirmed.*

John Peetz, Jr., and *F. L. Balderson,* for plaintiff in error.

Clarence S. Beck, Attorney General, and *Homer G. Hamilton,* for defendant in error.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, WENKE, and BOSLAUGH, JJ.

YEAGER, J.

This is a criminal action wherein in an information filed in the district court for Cheyenne County, Nebraska, Gerald Reinmuth, plaintiff in error, who will be hereinafter referred to as the defendant, was charged with the criminal offense of breaking and entering an automobile. To the information the defendant entered a plea of guilty. On April 26, 1956, the court, without pronouncing sentence and agreeable to the terms of sections 29-2217 to 29-2219, R. R. S. 1943, placed the defendant on probation for a period of 3 years.

The conditions of the probation were: That the defendant should indulge in no unlawful, dishonest, injurious, or vicious habits; that he should avoid places and persons of disreputable or harmful character; that he should abstain from the use of alcoholic beverages if the use of the same contributed to his offense; that he should remain and reside in Scotts Bluff County; that he should pay a fine of $200 and costs in installments within 6 months; and that he should report to his probation officer.

Thereafter on June 19, 1956, the county attorney filed in the action an information charging that the defendant had violated the conditions of his parole. The violations charged were that he refused and neglected to refrain from indulging in unlawful, dishonest, and injurious habits; that he failed and refused to avoid persons and places of a disreputable and harmful character; that he failed to remain and reside in Scotts Bluff County; that he failed to abstain from the use of alcoholic beverages; that he failed to pay the fine and costs except $10; and that on June 18, 1956, he was caught stealing clothes while in a state of intoxication at the Sioux Ordnance Depot, Sidney, Cheyenne County, Nebraska.

On July 18, 1956, a trial was had on the charges contained in the information for violation of probation. At the conclusion of the trial the court found that the defendant had violated his probation. Thereupon he was

sentenced to serve a term of not less than 18 months nor more than 2 years in the State Reformatory for Men at Lincoln, Nebraska. A motion for new trial was filed which was overruled.

From the judgment and sentence and the ruling on the motion for new trial the defendant has brought the case to this court for review by petition in error. By the petition he contends that there was error in the proceedings of the district court entitling him to a reversal of the judgment and sentence.

As grounds for reversal the defendant has set forth in his brief seven assignments of error. The first three will be considered collectively since all of them relate to the question of whether or not the evidence was sufficient to sustain the charge that the defendant violated the conditions of his probation or some of them.

The evidence in support of the charges contained in the information that the defendant failed to refrain from unlawful, dishonest, and injurious habits and that he was caught stealing clothes stands without contradiction. Witnesses testified that the defendant was apprehended in Barracks 14 at the Sioux Ordnance Depot in Cheyenne County, Nebraska, in possession of certain clothes belonging to one Louie Lawrence which he had taken from Room 2 in the barracks, which was the room occupied by Lawrence. The taking was without the consent of Lawrence. The defendant admitted the taking.

The defendant testified that an unnamed person had told him that the room described was his and had asked defendant to go there and get the clothes.

It is clear that the trial court did not accept the defendant's story as true, but on the contrary came to the conclusion that the act of taking by the defendant was larcenous. This the court had a right to do in the light of the evidence summarized, and the evidence of the conduct of the defendant at the time and the surrounding circumstances, which we do not deem necessary to repeat here. The evidence of the State was of probative value.

It showed a violation of the probationary condition that the defendant should not indulge in unlawful, dishonest, or injurious habits.

This court said in Sellers v. State, 105 Neb. 748, 181 N. W. 862: "Any probative evidence showing a violation of probationary conditions by conduct sufficient to convince the district court that defendant will not refrain from criminal acts in the future without punishment will sustain the revocation of a parole." See, also, Carr v. State, 152 Neb. 248, 40 N. W. 2d 677.

It appears to be the contention of the defendant made by the fourth assignment of error that in a case where the act or acts set forth as ground for vacation of probation are criminal in character the venue of the act or acts charged must be proved. No authorities are cited which sustain this view. We think there are none, and in reason none should obtain. Reprehensible conduct is made the basis for revocation of probation, and where the conduct is sufficiently proved enforcement of the provisions of the probationary statute should not be denied because of failure of proof that the act or acts complained of took place on a particular side of a county line. See Carr v. State, *supra*. This is a sufficient answer also to the seventh assignment of error.

By the fifth assignment of error it is contended substantially that inquiry of witnesses as to possession and use of intoxicating liquor was improper. The contention is without merit, especially in view of the contents of the probationary order and the information for violation thereof.

In Young v. State, 155 Neb. 261, 51 N. W. 2d 326, it was pointed out that the matter of placing a defendant on probation resides in the discretion of the trial court, and in the exercise of that discretion it has broad powers of inquiry as to facts and circumstances and other obtainable information. In that case it is also pointed out that in the event of application for revocation of probation the court has like broad powers of inquiry which it

may exercise in determining whether or not the probation should be revoked.

It cannot well be said that evidence as to the use, extent, and apparent effect of use of intoxicating liquor is not a proper area of inquiry in determining whether or not probation should be granted or if granted, whether or not it should be revoked.

The sixth assignment of error, to the extent necessary to consider it herein, relates to two questions asked of the defendant with regard to previous criminal record. The first question was asked and objection to it was made. The objection was sustained. Under these circumstances error may not be claimed. The defendant was then asked if he had ever been convicted of a felony. Over objection he answered "Yes."

In this no error was involved. The question was one which could be asked with propriety for impeachment purposes. The right is declared by section 25-1214, R. R. S. 1943, as follows: "A witness may be interrogated as to his previous conviction for a felony, but no other proof of such conviction is competent except the record thereof."

In Latham v. State, 152 Neb. 113, 40 N. W. 2d 522, this court pointed out that the rule has application to a defendant in a criminal case who has become a witness in his own behalf. Following a quotation of the statute this court said: "A defendant in a criminal case who becomes a witness subjects himself to the rules applicable to other witnesses."

Finding no prejudicial error the judgment of the district court is affirmed.

AFFIRMED.

CHAPPELL, J., participating on briefs.

NETTIE M. SHORT ET AL., APPELLANTS, V. EARL P. KLEPPINGER ET AL., APPELLEES.

81 N. W. 2d 182

Filed February 15, 1957. No. 34038.

1. **Deeds.** Whether or not a deed is delivered ordinarily depends upon the intention of the grantor as determined from the facts and circumstances of each particular case.
2. ———. No particular acts or words are necessary to constitute a delivery of a deed. Anything done by the grantor from which it is made to appear that a delivery was intended, whether by words or acts, or both, is sufficient.
3. ———. The criterion upon which the question of delivery depends is whether or not the grantor intended the deed to operate as a muniment of title to take effect presently.
4. ———. A conveyance once made cannot be changed by any subsequent act or statement, which does not meet the requirements of law governing the conveyance or nonacceptance of property.
5. **Witnesses.** A statute making a witness having a direct legal interest in the controversy incompetent to testify against the representative of a deceased person as to any conversation or transaction between such witness and the deceased person does not render incompetent as a witness a third party who relates a conversation between the deceased and another, in which the witness took no part.
6. **Deeds: Witnesses.** An attorney who prepared a deed at the request of the grantor and who was present at the time of its execution and delivery is competent to testify to factual matters concerning the preparation, execution, and delivery of the deed, such matters not being privileged communications within the meaning of sections 25-1201 and 25-1206, R. R. S. 1943.
7. **Attorney and Client: Witnesses.** Only confidential communications to one's attorney are protected by sections 25-1201 and 25-1206, R. R. S. 1943, and privilege does not extend to communications made in the presence of others or mere directions given to an attorney acting as scrivener in preparation of instruments.
8. **Wills: Deeds.** A provision in the will of the grantor, made subsequent to the execution of a deed and indicating that he had conveyed the property involved in the controversy by deed, is a circumstance that properly may be considered with all the other facts and circumstances in determining whether or not there had been a delivery of the deed with the intent to convey the property described in it to the named grantees.

APPEAL from the district court for Boone County: ROBERT D. FLORY, JUDGE. *Affirmed.*

Sterling F. Mutz, for appellants.

Louis B. Nore, Brogan & Brogan, and *Robert F. Galloway,* for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CARTER, J.

This is a suit in equity by the ten named residuary legatees in the will of Elizabeth J. Illian to have a deed to 240 acres of land executed on July 5, 1949, to appellees Earl P. Kleppinger and Hallie J. Kleppinger, declared null and void. The trial court found that the deed was properly executed and delivered on July 5, 1949, and quieted the title to the land described therein in appellees as tenants in common. The plaintiffs below have appealed.

The appellants, who will be hereafter referred to as the plaintiffs, are nieces and nephews of the deceased first husband of Elizabeth J. Illian. The appellees, who will hereafter be referred to as the defendants, are nephews of Elizabeth J. Illian, they being the sons of her deceased brother. Mrs. Illian died on January 5, 1954, without issue. On February 5, 1954, Roger I. Blatter was appointed administrator with will annexed of the estate of Elizabeth J. Illian, deceased, and he qualified as such. We shall hereafter refer to him as the administrator. The sole issue to be determined under the pleadings and evidence is whether or not the deed in question was delivered on July 5, 1949.

The substance of the evidence offered at the trial is as follows: On July 5, 1949, the deceased, accompanied by her nephew, Earl P. Kleppinger and his wife, Mildred, went to the office of her lawyer, Louis B. Nore, and caused the deed to be drawn and executed. Mr. Nore testified that after the deed was executed he

handed it to Earl Kleppinger at the direction of Mrs. Illian. Mildred Kleppinger testified that Mrs. Illian told Mr. Nore that she wanted the south farm, it being the one in question, to go to Earl and Hally and that he was to so draw the deed, that she wanted it drawn accurately as this was to be the final act. Mildred testified that, after the deed was drawn and executed, Mrs. Illian said to Mr. Nore: "Give those deeds to Earl,—give that deed to Earl. It is now his. It is his responsibility. I have given this property away. It is no longer mine." Mildred testified further that Mrs. Illian told Earl to take the deeds to Lincoln and keep them in his box in Lincoln. She says there was some discussion about registering the deeds and that Earl stated that since Mrs. Illian had the use of the land during her lifetime, why not wait until her death to register them and that Mrs. Illian replied: "If you do not register them at this time, immediately upon my death, take them to the court house and register them. Don't wait for anything, not even for my funeral." She then stated that Mr. Nore placed the deed and an affidavit prepared by Mr. Nore in an envelope and sealed it. A statement was placed on the outside of the envelope and signed by Mrs. Illian. The statement was: "TO THE EXECUTOR OF THE ESTATE OF ELIZABETH J. ILLIAN:—Please hand this envelope to Earl P. Kleppinger and Hallie J. Kleppinger, after my death. It has in it certain valuable property belonging to said persons. Signed, Elizabeth J. Illian." Mrs. Illian then said: "Now, give that to Earl." Mildred stated that Earl held the envelope in his hand and, after some discussion decided not to take it with him because of "the distance and the danger of transportation, and the necessity to bring them back for registration and because there were other deeds, as you know, involved, and these people who were to receive the other deeds were scattered all over the United States,—one of them was even in Hawaii." The record shows that Mrs. Illian and Mr. Nore then took

the envelope to the bank, while the others awaited their return.

Louis B. Nore, the attorney for Mrs. Illian, testified that he prepared the deed at her request; that it was signed by Mrs. Illian in his presence; and that he took the acknowledgment on the deed as notary public. He testified that after the execution of the deed and affidavit he handed them to Earl P. Kleppinger at the specific request of Mrs. Illian. He testified also that he placed the deed and affidavit in the envelope hereinbefore referred to and caused it to be sealed. He further stated that the envelope and contents were handed back to him and that he and Mrs. Illian took it to the bank and placed it in Mrs. Illian's private box.

The record shows, also, that on July 6, 1949, Mrs. Illian made her will in which it was provided: "Fourth: I have conveyed all my real estate by good and sufficient warranty deeds and I do not own any real estate at this time."

There is evidence in the record that on an occasion, probably in 1952, Mrs. Illian was asked by a neighbor about selling off a few acres of the farm. She replied that she could not sell it because it was not hers, that she had given it away by deed. A neighbor, Grace Langrall, testified that she was well acquainted with Mrs. Illian and that the latter had told her that her real estate, except her home, was to go to her side of the family. One Dorothy Hohbein, a housekeeper for Hally J. Kleppinger, testified that Mrs. Illian told her in 1951: "Well, I deeded Earl and Hally the south farm."

There was no testimony offered by the plaintiffs which disputed or impeached the evidence of the defendants tending to establish the delivery of the deed. Plaintiffs do contend, however, that the evidence of Mildred Kleppinger and Louis B. Nore is incompetent, and that if this be so, the evidence is insufficient to sustain the judgment of the trial court.

The record shows that on November 13, 1953, Roger I. Blatter was appointed guardian of Elizabeth J. Illian as an incompetent person. In such capacity he entered the box belonging to Mrs. Illian and found the envelope and contents to which reference has hereinbefore been made. He took it, accompanied by his attorney, to the office of the county judge of Boone County. The envelope and contents were thereafter retained by the county judge for safe keeping. On March 2, 1954, the envelope and contents were delivered to Hally J. Kleppinger for himself and for Earl P. Kleppinger by power of attorney, a receipt being given therefore by Hally J. Kleppinger. The deed was recorded on March 2, 1954. It was stipulated by the parties that no instruments were filed of record relating to the land described in the deed between July 5, 1949, and March 2, 1954.

Whether or not a deed is delivered ordinarily depends upon the intention of the grantor as determined from the facts and circumstances of each particular case. No particular acts or words are necessary to constitute delivery of a deed. Anything done by the grantor from which it is made to appear that a delivery was intended, whether by words or acts, or both, is sufficient. The criterion upon the question of delivery is whether or not the intention of the grantor was that the deed was to operate as a muniment of title to take effect presently. If such was the purpose, the delivery was complete and the title to the property passed. A conveyance once made cannot be changed by any subsequent act or statement, unless it meets the requirements of the law governing a conveyance or nonacceptance of the property. Hipsley v. Hipsley, 162 Neb. 518, 76 N. W. 2d 462; Dowding v. Dowding, 152 Neb. 61, 40 N. W. 2d 245; Black v. Romig, 151 Neb. 61, 36 N. W. 2d 772. It is clear from our holdings that, without a delivery in the lifetime of the grantor, there is no valid deed of conveyance. Where the proof shows only the execution of deeds which were found among the private papers

of the grantor after his death, it is not sufficient to establish delivery.

The evidence of Mildred Kleppinger supports the finding of the trial court that there was a delivery of the deed in the instant case. Plaintiffs contend, however, that her evidence was incompetent under the provisions of section 25-1202, R. R. S. 1943, commonly called the dead man's statute. This statute prohibits persons having a direct legal interest in the result of any civil action or proceeding from testifying to any transaction or conversation had between the deceased person and the witness, when the adverse party is the personal representative of a deceased person and their interest is adverse to that of the respresentative who makes objection and does not waive the prohibition. Mildred Kleppinger, as the wife of Earl P. Kleppinger, one of the grantees in the deed involved in the present case, has a direct legal interest in the result under our holdings in Oft v. Ohrt, 128 Neb. 848, 260 N. W. 571, and Garner v. McCrea, 147 Neb. 541, 23 N. W. 2d 731.

With reference to the testimony of Mildred Kleppinger, the evidence shows that the law office of Louis B. Nore consists of two rooms. At the time the deed was drawn and executed, Mrs. Illian, Mr. Nore, and Earl Kleppinger were in the inner office. Mildred sat just outside of the open door connecting the two rooms. She took no part in the conversations or transactions that took place at that time, although she heard what was said and saw what was done. The rule in such cases is: The statute does not apply where the transaction or conversation was not between the witness and the deceased person, but between the latter and a third party, in which the witness took no part. Kroh v. Heins, 48 Neb. 691, 67 N. W. 771; McNea v. Moran, 101 Neb. 476, 163 N. W. 766; Tyler v. Estate of McDougal, 126 Neb. 534, 253 N. W. 672; Dvorak v. Kucera, 130 Neb. 341, 264 N. W. 737. The evidence of Mildred Kleppinger

was clearly admissible under the foregoing holdings of this court.

The plaintiffs contend also that the evidence of Louis B. Nore, the attorney for the deceased, was not admissible for the reason that it was a privileged communication. The evidence shows that Mr. Nore drafted the deed and signed it as a witness at the request of Mrs. Illian. His evidence relates to the facts concerning the drafting, execution, and delivery of the deed. It does not relate to communications or transactions that are privileged because of their confidential nature. In re Estate of Coons, 154 Neb. 690, 48 N. W. 2d 778; Lennox v. Anderson, 140 Neb. 748, 1 N. W. 2d 912; Brown v. Brown, 77 Neb. 125, 108 N. W. 180. In any event, the presence of Earl and Mildred Kleppinger had the effect of removing any privilege that otherwise might have been invoked. Communications between attorney and client made in the presence of others do not constitute privileged communications within the meaning of sections 25-1201 and 25-1206, R. R. S. 1943. It is only communications which are confidential that are protected. Directions given by a grantor to an attorney acting as scrivener in the preparation of a deed do not come within the purview of the statutes governing privileged communications. Jenkins v. Jenkins, 151 Neb. 113, 36 N. W. 2d 637; Crawford v. Raible, 206 Iowa 732, 221 N. W. 474. We think the trial court was right in admitting this evidence.

The evidence shows that on the day following the execution of the deed, Mrs. Illian executed her will, in which it was stated that she had no real estate as she had given it away by deed. This question was before the court in Hipsley v. Hipsley, *supra,* in which we said in effect that this was evidence confirming the execution and delivery of the deeds in question. We think the provision of the will in the instant case is evidence to be considered in connection with all the circumstances in determining whether or not there was a delivery of

the deed by Mrs. Illian with the intent to divest herself of the title to the lands described therein.

A deed does not become operative until it is delivered with the intent that it shall become effective as a conveyance. Whether such intent actually existed is a question of fact to be determined by the evidence and circumstances of the case. If the grantor's conduct and all the circumstances connected with the transaction are such as to indicate that it was the intention of the grantor to give effect and operation to the deed, and to relinquish all power and dominion over it, the law will effectuate the deed in accordance with this intention, and will construe the delivery as valid. A deed once delivered does not cease to be a deed because it is subsequently found in the possession of the grantor. In the present case there is evidence of the actual delivery of the deed to one of the grantees, accompanied by the statement that the property is now his. The attorney for the grantor testified to the preparation, execution, and delivery of the deed to Earl P. Kleppinger, all at the instance of Mrs. Illian. The will made by Mrs. Illian on the day following the execution of the deed confirms her intention to relinquish all power and control over the deed. The evidence of her subsequent statements and conduct is consistent with the finding that a delivery was made. There is no evidence at any time after the execution of the deed that her conduct was inconsistent with an intent to deliver the deed on July 5, 1949. On a trial de novo, we arrive at the same conclusion as the trial court that the evidence sustains the execution and delivery of the deed on July 5, 1949, with the intent to convey the land described therein to the grantees. The decree of the district court is affirmed and the costs of the appeal are taxed against the appellants.

AFFIRMED.

SIMMONS, C. J., dissenting.

I have no disagreement with the rules of law stated

by the court. The court fails to state or consider a fundamental rule applicable here when the deed was found in the possession of the grantor.

It is: "It is essential to the validity of a deed that there be a delivery and the burden of proof rests upon the party asserting delivery to establish it by a preponderance of the evidence." Lewis v. Marker, 145 Neb. 763, 18 N. W. 2d 210.

This is a trial de novo with the burden of the proof on the defendants.

There is another rule particularly applicable here, which the court fails to state or consider. It is: "An instrument is not delivered until it has passed beyond the dominion, control, and authority of the maker and is no longer capable of being recalled." Kula v. Kula, 149 Neb. 347, 31 N. W. 2d 96. The deed here was found in Mrs. Illian's safety deposit box where it had been placed by her and her attorney. It was under the "dominion, control, and authority of the maker."

The court states: "There was no testimony offered *by the plaintiffs* which disputed or impeached the evidence of the defendants *tending* to establish the delivery of the deed." (Emphasis supplied.)

I agree that the plaintiffs did not offer such evidence. The only eye and ear witnesses on that issue were the attorney and an interested party defendant. However, the defendants did offer such evidence. It is largely ignored by the court.

I refer herein to the Kleppingers by their first names.

I disagree with the ultimate conclusion of the court. The court's conclusion rests upon two separate conclusions. One conclusion is a statement that the deed involved in this transaction was executed and delivered on July 5, 1949.

The other conclusion is that on the "day following the execution of the deed" Mrs. Illian executed her will.

By thus separating the transactions with reference to the deed by 1 day from the execution of the will, the

court considers the deed as a delivered instrument and the will as being made "subsequent to the execution of a deed" and only of importance to determine whether or not there had been a delivery of the deed the preceding day with intent to convey. The court separates into two separate transactions that which was in fact all done as a part of one transaction.

The only evidence in the record upon which the court can rest a finding of the execution of the will on the "subsequent" day is its date—July 6, 1949. The attorney testified only that it was dated "one day subsequent" to the deed. The deed is dated July 5, 1949. No witness testified as to an independent knowledge of the signing of the deed on that date.

It is to be remembered that the transaction took place in July 1949. The witnesses testified in July 1955—6 years later.

I state here the record as to whether the transactions took place on 1 day or 2 days and will discuss later the evidence as to the transactions.

The attorney was asked on direct examination if Mrs. Illian consulted him "on or about the 5th day of July, 1949." He answered "Yes." He was then asked if "at that time, on the 5th day of July, 1949" he performed services for her. He answered "Yes" and then relates the preparation of "certain warranty deeds," one of them being the deed in question. That was "on or about" July 5, 1949. Mildred was asked on direct examination if she accompanied her husband to Albion "on or about the 5th day of July, 1949." She answered "Yes" and then was asked and testified as to the matters involved in this litigation. She does not otherwise fix the date. I submit that the date of July 5, 1949, which the court accepts rests fundamentally upon the date on the deed.

It is not material to our consideration here as to whether the transaction of the deed and the will occurred on July 5 or July 6, 1949. It is material to deter-

mine whether one or two conferences and one or two days are involved.

As to that there can be no question from this record that everything that had to do with the drafting of the deeds and the execution of the will occurred at one conference, at one time, and on one day only, and in the attorney's office.

Both the attorney and Mildred testified as to where the attorney, Mildred, Earl, and Mrs. Illian sat while the deeds were being prepared and signed, and the disposition discussed. There is not even a suggestion in the record of a meeting in the attorney's office of more than one day, or even that the meeting broke up and reassembled on the day it was held. Both witnesses testified to a continuing event, beginning when Mrs. Illian, Earl, and Mildred went to the attorney's office, and ending when the attorney and Mrs. Illian took the deeds to the bank and Earl and Mildred stood outside watching the culmination of the day's activity.

The court accepts the above as correct as to the deed. The question then is: Does it apply also to the will? The answer of the record that it does is without dispute. After testifying about the deeds, the attorney testified that he prepared the will; that Earl, Mildred, Mrs. Illian, and himself were present; and that the will was prepared "at or about the same time as the deeds." There is no evidence of any "subsequent" day execution of the will and no evidence of Mildred and Earl being present on a "subsequent" day. Mildred confirms this testimony, for she testified that there was discussion about the plaintiffs "when the deed and the will were prepared in Mr. Nore's office" and when she was "sitting in the outer office." She testified as to only one time when she was sitting in the outer office or elsewhere in the office. The plaintiffs are named in the will.

I now go to the merits of the case.

Certain facts in this record are either stipulated or not in dispute. I state those first.

Mrs. Illian was the owner of five pieces of real estate. By an instrument dated July 5, 1949, she executed and acknowledged a warranty deed to 240 acres of this property wherein Earl and Hallie are named as grantees "subject only to a life use reserved to said grantor." This is the deed involved in this action.

The deed (and an affidavit which was not admitted in evidence) were placed in an envelope upon which was typed the following: "TO THE EXECUTOR OF THE ESTATE OF ELIZABETH J. ILLIAN:- Please hand this envelope to Earl P. Kleppinger and Hallie J. Kleppinger, after my death. It has in it certain valuable property belonging to said persons." The writing was signed by Mrs. Illian. The envelope was sealed and placed in Mrs. Illian's safety deposit box by her and the attorney.

By an instrument dated July 6, 1949, Mrs. Illian executed her will. It contained two provisions important here: "I have conveyed all my real estate by good and sufficient warranty deeds and I do not own any real estate at this time. * * * I make, constitute and appoint Earl P. Kleppinger and Delma Garmire Wilson to be Executor and Executrix of this, my last Will and Testament, hereby revoking all former wills by me made."

The direction on the envelope is related to the naming of Earl as "Executor" in the will. It was a direction to him as Mrs. Illian's executor to deliver the deed to himself and Hallie *after* Mrs. Illian's death.

On July 10, 1953, a petition was filed, signed by Earl for the appointment of a guardian for Mrs. Illian on the ground of mental incompetency. In it is the statement of fact made by Earl that Mrs. Illian was then the owner of real estate of the value of $40,000. In this connection the inventory of the estate filed June 9, 1954, lists five parcels of real estate with the recital that decedent had conveyed it "reserving a life estate unto herself." The appraised value was $48,400. On August 17, 1953, Hallie was appointed as guardian. On

October 22, 1953, Hallie resigned as guardian, and Roger I. Blatter was appointed on October 30, 1953. On November 13, 1953, letters of guardianship were issued to him. Mr. Blatter as such guardian caused Mrs. Illian's safety deposit box in the bank to be opened and found therein the envelope above referred to, together with Mrs. Illian's will. He deposited the envelope, unopened, and the will with the county judge.

On January 5, 1954, Mrs. Illian died and Hallie petitioned for the probate of her will. The executors named in the will did not qualify. Mr. Blatter was appointed administrator with the will annexed.

On February 13, 1954, by an instrument acknowledged in the State of Florida, Earl executed a power of attorney to Hallie to receive the envelope from the administrator with the will annexed and containing this language: "After receiving said envelope, my attorney, Hallie J. Klepping (sic) is to open the envelope and show the contents to the said administrator, and to register any deeds or take any steps necessary to obtain for me legal ownership of any property involved. Hally J. Kleppinger is to have the power to act as Attorney for me only until such time as any deeds to property contained in said envelope is registered in the courts and legal ownership established."

On March 2, 1954, Hallie receipted for the envelope from the administrator. The receipt acknowledged that the deed here involved was in the envelope. The deed was recorded March 2, 1954.

These proceedings clearly negative any contention of Hallie or Earl that they considered themselves the grantees in a deed delivered in Mrs. Illian's lifetime. The court gives no consideration to these two documents.

Now we go to the other evidence.

If we undertake to state and analyze the evidence from the consideration only of the one deed here involved, as does the court, the evidence points only to chaotic confusion as to what Mrs. Illian did and intended to do.

If the evidence is stated and analyzed from a consideration of all that the record shows, then it leads to the conclusion that this deed was only a part of a testamentary disposition of Mrs. Illian's estate by the use of deeds and a will. I have heretofore recited the undisputed evidence as to the concurrent drafting of the deeds and the will that sustains that conclusion.

On or about July 5, 1949, Mrs. Illian, Earl, and Mildred went to the office of the attorney. As to the deed here involved Mildred testified that Mrs. Illian told the attorney that "she wanted to leave" the land here involved to Earl and Hallie. That language indicates a testamentary intent and not an intent to convey presently.

The record repeatedly refers to other deeds that were drawn and executed at that time, purporting to convey other parcels of land to other grantees. The provisions of the other deeds are not shown. It does appear that the grantees in those deeds lived at other places in the United States and that one lived in Hawaii.

The particular deed here involved is dated and acknowledged as of July 5, 1949. The dates of the other deeds do not appear. The will is dated July 6, 1949. It is apparent, however, that the deeds and the will were executed as a part of one general plan of disposing of Mrs. Illian's property. The recital in the will that "I have conveyed all my real estate by good and sufficient warranty deeds" indicates that the will was drafted after the execution of the deeds. However, as above pointed out, that all occurred on the same day as a part of the same transaction. The recital that "I do not own any real estate at this time" is not in accord with the reserved life estate and the present contention of Earl and Hallie, for at that time Mrs. Illian owned a life estate, a freehold interest, in the land. The court accepts this statement in the will as literally true and as "evidence confirming the execution and delivery of the *deeds* in question." (Emphasis supplied.) The state-

ment is contrary to the terms of the deed and the contention of the defendants here. The court uses an incorrect statement from the will as a reason to sustain a finding of delivery. The above provision in its entirety is obviously intended as an explanation of the absence in the will of devises of particular real estate. The deeds performed that part of the testamentary disposition.

After the deeds were executed, the question came as to "what would be done" with the deeds. It was suggested that they be recorded at once. Earl disapproved. There was more "discussion" and it was suggested that Earl take them to Lincoln and record them "immediately" upon Mrs. Illian's death and not even to wait for her funeral. Had Mrs. Illian decided to follow this second plan then it is clear that Earl had all the deeds with directions to take steps—after Mrs. Illian's death—that would vest title in the grantees in all deeds. On this record there could be no claim of delivery as to the other deeds either at that time or before Mrs. Illian's death. The deed here involved is in the identical position as the other deeds. It remained under the dominion, authority, and control of the maker. That fact is established conclusively by what was next discussed and done. The second proposal was put aside because of the dangers involved in transportation and the necessity of bringing the deeds back to Albion for recording. It was then decided that the deeds would be put in envelopes and with directions to Mrs. Illian's "Executor" —Earl.

If the conclusion of the court is correct, it follows that when Mrs. Illian and Earl sat there and discussed the second and third plans the deeds had already been delivered and title had passed. The discussion of the second and third plans was, under the holding of the court, idle chatter. It is sufficient to say that none of the parties so considered it.

The disposition of the other deeds is not shown di-

rectly. However, the guardian testified to the finding in Mrs. Illian's safety deposit box of envelopes with instructions to the executor on the outside, and that the envelope here involved and the others were delivered to the county judge.

The evidence points to the conclusion that the final determination of the disposition of the deeds was to keep them in the possession of and under the control of Mrs. Illian and negatives any intent to deliver them under the rule earlier stated herein.

It is clear from the record that the deeds were kept in the possession of the attorney, who represented Mrs. Illian and not the defendants in this matter, and that when the deeds, still in the possession of Mrs. Illian and her attorney, were taken by them and put into the safety deposit box they were in the possession of Mrs. Illian and her attorney. They had not "passed beyond the dominion, control, and authority of the maker." There was no necessity of showing that they were "capable of being recalled." See Kula v. Kula, *supra*. There was no claim of Earl that the deed was his as a delivered instrument. He suggested and agreed to this procedure. Hallie knew nothing about it.

There is other evidence in the record that sustains that conclusion. It relates to the particular deed here involved and "those deeds." The attorney and Mildred testified that this deed was handed to Earl at Mrs. Illian's directions. He had the deeds in his hands with the statement from Mrs. Illian that the deed "is his responsibility"; it was his "to take care of."

These are words that indicate directions to an agent as to his care and responsibility. It would seem that they were surplusage if there was an irrevocable delivery at that time. The court ignores the limitations and conditions of these statements.

There is other evidence in this record that the parties discuss here.

Hallie and a Miss Hohbein called upon Mrs. Illian in

the summer of 1951 at her home. Her testimony is that Mrs. Illian asked Hallie "who I was" and he said "I was his housekeeper," and that Mrs. Illian said, "* * * I deeded Earl and Hally the south farm." From the record it appears that that was a statement made to a total stranger without any preliminary discussion. Mildred testified to having heard that conversation and others of similar import.

The defendants, however, called a neighbor lady of Mrs. Illian. She is not shown to have any possible interest in the outcome of this litigation. This lady testified as to statements made to her by Mrs. Illian as to where and to whom her property was "to go." Those words were repeated four times in her direct examination. They obviously relate to a future vesting of title.

Mildred testified to the fact that Mrs. Illian kept the key to her bank box secreted in her home and that "every time we were up there" Mrs. Illian discussed the location of the key with them, showed Earl and Mildred where it was hidden, and admonished them that no one else was to know its location. That trust was kept, apparently, for the guardian found it necessary to drive the pins out of the hinges to the door of the enclosure where the box was kept in order to get access to it. The key was found in the house by the administrator after Mrs. Illian's death.

Earl testified that he had access to the safety deposit box at all times. Mildred testified that on at least two occasions Earl left Mrs. Illian's home with directions to go to the bank and open the box for specific purposes not connected with these transactions, and that Earl returned later and reported what he had done. This evidence was offered, as defendants argue here, to show access to the deed and as a foundation for a presumption of delivery. The attempt was so futile that the court ignores it.

It does not appear that either Earl or Mildred knew

that the deed or deeds and will were in the box. The attorney testified that in the presence of Mrs. Illian he put the envelope containing the deed in the bottom of the safety deposit box. We find no evidence of when the will was put into the box. The will and the envelope were in the box when the guardian examined its contents.

It appears that at one time during this transaction Earl had possession of the deed involved here along with the other deeds. He had that possession obviously while it was being determined what should be done with the deeds. At no time under this evidence was his possession that of a grantee. Whatever tentative authority Earl may have had to later deliver the deeds for Mrs. Illian, it was almost immediately revoked when other disposition of the deeds was determined upon by Mrs. Illian. Earl then made no claim of delivery but readily concurred in the alternate disposition. In fact it appears that he suggested it and made no claim to the deed as grantee, and handed them back to the attorney who put them in his pocket and "later" took them to the bank and put them into Mrs. Illian's safety deposit box while Earl and Mildred watched as they went to the bank. Again Earl made no protest or claim that the attorney and Mrs. Illian had deeds which had been delivered to him.

In Smith v. Black, 143 Neb. 244, 9 N. W. 2d 193, we held: "The criterion upon which the question of delivery depends is as to whether or not the intention of the grantor is that the deed shall operate as a muniment of title to take effect presently, or in other words, whether or not it has passed beyond the dominion, control and authority of the maker, and is no longer capable of being recalled."

Tested by that rule there was no delivery here to Earl as a grantee.

I am mindful of the fact that in the endorsement on the envelope containing the deed here involved Mrs.

Illian recited that it contained "property belonging to" Earl and Hallie. Standing alone these words might well import a present ownership of the contents. They do not stand alone. They must be construed together with the direction to Earl, her named executor, to deliver "after my death." It was the obvious intention of Mrs. Illian that the envelope and contents should not be delivered to Earl and Hallie until after her death and that the property rights therein should vest on delivery after Mrs. Illian's death, and not before. Together the language means when delivered the property right vests.

The court rests its affirmation largely on the testimony of Mildred. She was a willing witness. Under our holding in Holladay v. Rich, 93 Neb. 491, 140 N. W. 794, she "had a direct legal interest in the result of the suit." The court screens out and states that part of her evidence that is most favorable to the defendants or, as stated by the court, that which is "tending" to establish delivery. I would state and weigh all her testimony together with the evidence of other witnesses, as well as the facts and circumstances surrounding the execution and retention of dominion, authority, and control of the deeds and the will. The will and the deeds were all a part of one transaction. Mrs. Illian reserved dominion, authority, and control.

I would hold that the defendants have not sustained their burden, and that delivery of the deed was not proven to have been made in Mrs. Illian's lifetime. I would reverse the judgment and remand the cause with directions, as to this feature of the case, to render judgment for the plaintiffs.

CARL HALER, JR., APPELLEE, V. GERING BEAN COMPANY ET AL., APPELLANTS.

81 N. W. 2d 152

Filed February 15, 1957. No. 34045.

1. **Workmen's Compensation.** The applicable rule of construction of the Workmen's Compensation Act is that it be liberally construed to the end that its beneficent purposes may not be thwarted by technical refinement of interpretation.
2. ———. For workmen's compensation purposes "total disability" does not mean a state of absolute helplessness. It means disablement of an employee to earn wages in the same kind of work, or work of a similar nature, that he was trained for, or accustomed to perform, or any other kind of work which a person of his mentality and attainments could do.
3. ———. A workman who, solely because of his injury, is unable to perform or to obtain any substantial amount of labor, either in his particular line of work, or in any other for which he would be fitted except for the injury, is totally disabled within the meaning of the workmen's compensation law.
4. ———. A claimant for compensation under subdivision (3) of section 48-121, R. R. S. 1943, who through an injury has suffered a permanent partial loss of the use or function of two members, is entitled to recover such proportion of the compensation allowed for total disability under subdivision (1) of said section as the extent of his loss would bear to the total loss of such members.
5. ———. It was clearly the intent of the Legislature in establishing a schedule of benefits for the specific injuries listed in subdivision (3) of section 48-121, R. R. S. 1943, to fix the amount of such benefits without regard to the extent of the subsequent disability with respect to the particular work or industry in which the employee was engaged at the time of his injury.
6. ———. However, where an employee has suffered a schedule injury to some particular member or members and some unusual and extraordinary condition develops therefrom as a result thereof, which condition affects some other member or the body itself, an increased award is proper and should be made to cover such additional disability.
7. **Workmen's Compensation: Appeal and Error.** Where an employer appeals to the district court and fails to obtain a reduction of the award of the compensation court, the employee is entitled to an allowance of an attorney's fee. But if, on appeal to the Supreme Court, it is determined that the award of the district

court was erroneous and that a decree reducing the award of the compensation court should have been entered, any allowance of an attorney's fee by that court is erroneous.

APPEAL from the district court for Scotts Bluff County: CLAIBOURNE G. PERRY, JUDGE. *Affirmed.*

Jack E. Lyman and *Marvin L. Holscher,* for appellants.

Townsend & Youmans, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

WENKE, J.

This is a workmen's compensation case appealed from the district court for Scotts Bluff County. Appellee, Carl Haler, Jr., originally filed a petition in the Nebraska Workmen's Compensation Court stating that while he was employed as a common laborer by the appellants Gering Bean Company and Ted Baum Company he received, on or about February 19, 1952, personal injuries arising out of an accident that happened in the course of that employment. He therein set forth the extent of the injuries sustained and then asked for such relief as, under the provisions of the workmen's compensation law, he might be entitled to by reason thereof. Under his prayer appellee was entitled to receive whatever relief the facts established would entitle him to under the compensation law. As this court has often stated: "The applicable rule of construction is that the Workmen's Compensation Act is to be construed liberally so that its beneficent purposes may not be thwarted by technical refinement of interpretation." Franzen v. Blakley, 155 Neb. 621, 52 N. W. 2d 833.

The claim was tried to a judge of the compensation court who found for appellee and awarded him the following relief: The sum of $26 per week for a period of 85-3/7 weeks, the sum of $15 per week for 214-4/7 weeks, and thereafter the sum of $12 per week for the

balance of his life, credit being given for payments already made. Appellant The Fidelity and Casualty Company of New York is the workmen's compensation carrier for appellee's employers.

Appellants thereupon waived rehearing before the compensation court and appealed directly to the district court for Scotts Bluff County, that being the county in which the accident happened. Trial was had in the district court and the trial judge thereof found that appellee had been totally and permanently disabled as a result of injuries suffered from the accident and awarded him, because thereof, $26 per week for 300 weeks commencing on February 19, 1952, and $20 per week for the rest of his life. Since appellee had been paid $26 per week for the period from February 19, 1952, to August 18, 1953, totalling $2,028, the appellants were given credit for that amount. In addition thereto appellants were ordered to pay to Dr. S. P. Wiley the sum of $531 and an attorney's fee of $500.

Appellants filed a motion for new trial and, from the overruling thereof, perfected this appeal. The action is for review here de novo.

The evidence shows that immediately prior to and on February 18, 1952, appellee was employed by both appellants Gering Bean Company and Ted Baum Company as a common laborer; that on that date, while stooped over scooping beans, a stack of 100-pound bags of beans beside which he was working accidentally fell over onto him striking him first in the middle of his back; that he was completely covered thereby; and that, as a result thereof, he was seriously injured. It is conceded by all the parties that plaintiff received his injuries as a result of an accident arising out of and in the course of his employment and that, at the time, his average weekly compensation was $48.

Dr. S. P. Wiley of Scottsbluff, who attended and examined appellee on February 19, 1952, in the West Nebraska Methodist Hospital in Scottsbluff, diagnosed his

injuries to be as follows: An oblique comminuted fracture in front of the middle and upper two-thirds of the tibia and fibula of the right leg with the bones angulated in an outward direction at the fracture site and an extensive obliquely running comminuted fracture involving the distal half of the femur of the left leg. There was also a posterior displacement of the proximal end of the distal fragment and some posterior angulation through the fracture region as well as mild media angulation and a superficial laceration of the scalp, which took some 9 stitches to close.

Dr. Wiley testified he treated these fractures by the insertion of pins above and below the fracture sites and with pins and traction and later casted.

Appellee was released from the hospital on July 7, 1952, but was required to use crutches so the legs would not bear too much of his weight. On October 28, 1952, while still on crutches, appellee was examined by Dr. Samuel P. Newman in his office in Denver, Colorado. Dr. Newman's diagnosis of appellee at that time establishes there was a malunion of the fracture of his right tibia and fibula and the same of the lower third of his left femur. Appellee thereafter entered a Denver hospital and, on December 4, 1952, Dr. Newman operated on his right leg and endeavored to straighten it by rebreaking the tibia and then fastening the ends thereof at the break by a bone graft. Following this surgery a full-length leg cast was applied to this leg and he was allowed to leave the hospital on December 22, 1952, doing so on crutches which he continued to use for some 3 months thereafter.

The principal question raised by the appeal relates to the basis upon which appellee can recover. It is appellants' thought that appellee is limited to the provisions of subdivision (3) of section 48-121, R. R. S. 1943, because of the parts of his body which were injured, that is, the left leg and right foot. We shall discuss the

various provisions of this statute as they have application here.

Subdivision (1) of section 48-121, R. R. S. 1943, insofar as here material, provides in cases of total disability that: "For the first three hundred weeks of total disability, the compensation shall be sixty-six and two-thirds per cent of the wages received at the time of injury, but such compensation shall not be more than twenty-six dollars per week, nor less than fifteen dollars per week; Provided, that, if at the time of injury, the employee receives wages of less than fifteen dollars per week, then he shall receive the full amount of such wages per week as compensation. After the first three hundred weeks of total disability, for the remainder of the life of the employee, he shall receive forty-five per cent of the wages received at the time of injury, but the compensation shall not be more than twenty dollars per week nor less than twelve dollars per week; Provided, that if at the time of the injury the employee receives wages of less than twelve dollars per week, then he shall receive the full amount of such wages as compensation."

Subdivision (2) of section 48-121, R. R. S. 1943, insofar as here material, provides, in case of partial disability, that: "For disability partial in character, except the particular cases mentioned in subdivision (3) of this section, the compensation shall be sixty-six and two-thirds per cent of the difference between the wages received at the time of the injury and the earning power of the employee thereafter, but such compensation shall not be more than twenty-six dollars per week. This compensation shall be paid during the period of such partial disability, but not beyond three hundred weeks after the date of the accident causing disability."

Under these provisions we have said:

"For workmen's compensation purposes, 'total disability' does not mean a state of absolute helplessness, but means disablement of an employee to earn wages

in the same kind of work, or work of a similar nature, that he was trained for, or accustomed to perform, or any other kind of work which a person of his mentality and attainments could do." Elliott v. Gooch Feed Mill Co., 147 Neb. 309, 23 N. W. 2d 262. See, also, Elliott v. Gooch Feed Mill Co., 147 Neb. 612, 24 N. W. 2d 561; Franzen v. Blakley, *supra.*

"A workman who, solely because of his injury, is unable to perform or to obtain any substantial amount of labor, either in his particular line of work, or in any other for which he would be fitted except for the injury, is totally disabled within the meaning of the workmen's compensation law." Elliott v. Gooch Feed Mill Co., 147 Neb. 309, 23 N. W. 2d 262. See, also, Franzen v. Blakley, *supra.*

Subdivision (3) of section 48-121, R. R. S. 1943, insofar as here material, provides, in case of two member disability, as follows: "The loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two thereof, shall constitute total and permanent disability and be compensated for according to the provisions of subdivision (1) of this section. Amputation between the elbow and the wrist shall be considered as the equivalent of the loss of a hand, and amputation between the knee and the ankle shall be considered as the equivalent of the loss of a foot. Amputation at or above the elbow shall be considered as the loss of an arm, and amputation at or above the knee shall be considered as the loss of a leg. Permanent total loss of the use of a finger, hand, arm, foot, leg, or eye shall be considered as the equivalent of the loss of such finger, hand, arm, foot, leg, or eye. In all cases involving a permanent partial loss of the use or function of any of the members mentioned in this subdivision, the compensation shall bear such relation to the amounts named in said subdivision as the disabilities bear to those produced by the injuries named therein."

In applying a factual situation coming specifically

within this section we have limited the right of recovery strictly to the amounts therein provided regardless of the extent to which the injuries may affect the employee's subsequent ability to carry on the particular work in which he was engaged at the time of the injury. As stated in Bronson v. City of Fremont, 143 Neb. 281, 9 N. W. 2d 218: "A claimant for compensation under subdivision 3 of section 48-121, Comp. St. 1929, who through an injury has suffered a permanent partial loss of the use or function of both feet, is entitled to recover such proportion of the compensation allowed for total disability under subdivision 1 of said section as the extent of his loss would bear to the total loss of such members. Johnson v. David Cole Creamery Co., 109 Neb. 707, 192 N. W. 127; Huff v. Omaha Cold Storage Co., 136 Neb. 907, 287 N. W. 764. It was clearly the intent of the Legislature in establishing a schedule of benefits for the specific injuries listed in subdivision 3 to fix the amount of such benefits without regard to the extent of the subsequent disability with respect to the particular work or industry in which the employee was engaged at the time of his injury. Carlson v. Condon-Kiewit Co., 135 Neb. 587, 283 N. W. 220. Consequently, the compensation for permanent partial loss of the use and function of both feet, unaccompanied by other physical injury, cannot exceed the amount specified in subdivision 3. Hull v. United States Fidelity & Guaranty Co., 102 Neb. 246, 166 N. W. 628. In such case it is immaterial whether an industrial disability is present or not. Schmidt v. City of Lincoln, 137 Neb. 546, 290 N. W. 250."

And, as stated in Ottens v. Western Contracting Co., 139 Neb. 78, 296 N. W. 431: "There can hardly be any question that if it be determined that the disability of which appellant complains, if it be found to exist, is a normal, usual, logical and expected consequence of the injury to the fingers, then no compensation may be awarded in addition to that provided by the statutory

schedule. Hull v. United States Fidelity & Guaranty Co., 102 Neb. 246, 166 N. W. 628; Johnson v. David Cole Creamery Co., 109 Neb. 707, 192 N. W. 127; Schroeder v. Holt County, 113 Neb. 736, 204 N. W. 815; Greseck v. Farmers Union Elevator Co., 123 Neb. 755, 243 N. W. 898." See, also, Carlson v. Condon-Kiewit Co., 135 Neb. 587, 283 N. W. 220.

However, as also held in Ottens v. Western Contracting Co., *supra,* where an employee has suffered a schedule injury to some particular member and some unusual and extraordinary condition affecting some other member has developed as a result of the accident an increased award is proper and should be made to cover such additional disability.

We think this is not only true as to some other member but to any part of the body and that the following from Dowling v. Church E. Gates & Co., 253 N. Y. 108, 170 N. E. 511, cited with approval in Ottens v. Western Contracting Co., *supra,* states this principle very clearly:

"A claimant who has suffered a schedule injury covered by subdivision 3 of section 15 is entitled only to an award of the amount specified in the schedule for such injury in case the effect of the injury is the usual and expected effect. If, however, some unusual and extraordinary condition develops as a result of the injury the fact that the original injury is covered by the schedule does not prevent an award for the actual, although unusual and unexpected, condition which has developed as a result of the accident. The amputation of a foot may result in blood poisoning, paralysis or death. They are not the usual results of the injury and operation, although they may be the natural and unavoidable results in particular cases. When such an unusual and unexpected result occurs, an increased award should be made.

"The determination must depend upon the facts in each case. If the facts establish that a claimant is suffering

from a serious, unusual and unexpected condition as the result of a schedule injury, he is entitled to an award greater than that provided for such schedule injury. If the condition is the usual and expected result of the injury, the award must be limited to the schedule amount." See, also, Nebraska National Guard v. Morgan, 112 Neb. 432, 199 N. W. 557.

As stated in Nebraska National Guard v. Morgan, *supra:* "The argument is that, inasmuch as the injury was to the leg only, claimant is not entitled to greater compensation than he would have been if the leg had been amputated. We cannot adopt this conclusion. While the only direct result was a fracture of the surgical neck of the femur, the evidence establishes the facts that the injury left broken ends of bone in the hip of the claimant resulting in a malplacement of the hip bone against the pelvic bone, causing irritation of the nerves coming into the hip and affecting the whole physical and nervous system in such manner as to totally disable the claimant from doing any work. The district court found that the plaintiff was suffering from total disability, and such finding is amply sustained by the evidence." This is comparable to the situation here.

The medical witnesses of appellee, including that of Dr. Wiley who has attended appellee at all times except when treated by Dr. Newman in Denver, testify to the effect that there was a malunion or abnormal alignment of the bones at the site of the fractures and a shortening thereof caused by compression and twisting resulting from the accident. They place the shortening between the right knee and ankle at 3 centimeters or about 1.1811 inches and that of the left leg between the thigh and knee at 1 centimeter or about .3937 of an inch. This shortening and malalignment, they state, resulted in faulty locomotion and changed the weight-bearing plane of appellant's body, thus materially affecting his back and resulted in material changes therein.

These witnesses also testified appellee more or less

constantly suffers pain in his back, especially on movement; that he has marked tenderness in the region of the fifth lumbar and first sacral vertebra; that he loses his balance easily; that he has a twisting of his spine to a limited extent; and that the normal curvature of his back has disappeared. These conditions of his back are permanent, except that they may become worse, and have caused him to become totally unfit to engage in hard manual labor. We do not think these conditions of the back were the usual and ordinary results to be expected from the injury to his legs.

Appellee testified he was 33 years of age at the time of the accident; that prior thereto he had been in good health and always able to work; that his education was very limited; that he could not read or write; that he had always performed hard manual labor; and that there was nothing else he could do. He further testified that since the accident he has not been physically able to work because any movement causes him to have severe pain, principally in his back. He further testified the condition of his back has limited his ability to lift, walk, run, climb ladders, walk up stairs, or stand still; and that he loses his balance easily, fatigues quickly, and has generally lost his agility.

We think the facts fully establish that the appellee is totally disabled within the meaning of the Workmen's Compensation Act. We recognize that the medical experts of the appellants testified to the contrary and they, and another witness of appellants, left the impression that appellee is feigning his condition and that he is a malingerer. In this respect we have taken into consideration the fact that the trial judge heard the witnesses, saw appellee, and came to the conclusion that he was not. We come to the same conclusion.

Appellants also contend that the minimum provisions of the compensation law relative to total disability do not apply to permanent partial disability of multiple members. While that question has no significance here

we think it has been fully decided, contrary to appellants' contention, in Paulsen v. City of Lincoln, 156 Neb. 702, 57 N. W. 2d 666.

Appellants also contend the trial court erred in entering judgment allowing Dr. Wiley the sum of $531 for the services he rendered to appellee in connection with the injuries he suffered as a result of the accident. When Dr. Wiley was on the witness stand he did not have with him an itemized statement of his account, which it is stipulated has not been paid, but testified the amount thereof was the reasonable value of the services he had rendered appellee and within the limits of the Workmen's Compensation Act. Later, when the itemized statement was offered in evidence, appellants' counsel reserved the right to make objection thereto and the trial court gave him 10 days for that purpose. No objections were ever made. Consequently, the statement should have been received and we shall so consider it. We think the record fully supports the allowance.

Appellants also raise the question of the authority of the trial court to allow appellee an attorney's fee and of our doing so. The Workmen's Compensation Act provides: "In the event the employer appeals to the district court from the award of the compensation court, or any judge thereof, and fails to obtain any reduction in the amount of such award, the district court may allow the employee a reasonable attorney's fee to be taxed as costs against the employer, and the Supreme Court shall in like manner allow the employee a reasonable sum as attorney's fees for the proceedings in that court." § 48-125, R. R. S. 1943.

We have held: "Where an employer appeals to the district court and fails to obtain a reduction of the award of the compensation court, the employee is entitled to an allowance of an attorney's fee. But where, on appeal to the supreme court, it is determined that the award of the district court was erroneous and that a decree reducing the award of the compensation court should have

been entered, the allowance of the attorney's fee is also erroneous." Bronson v. City of Fremont, *supra*.

In view of our holding herein, which affirms the judgment of the district court, we find it was proper for the trial court to allow appellee an attorney's fee and that we should do likewise. Considering the questions raised and the amount involved we think appellee is entitled to an attorney's fee for services of his counsel in this court of $350, same to be taxed as costs.

AFFIRMED.

ROBERT FULTON, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
81 N. W. 2d 177

Filed February 15, 1957. No. 34089.

1. **Rape.** In a prosecution for rape, competent evidence must show beyond a reasonable doubt not only that the defendant committed the act charged but that he did so under such circumstances that every element of the alleged offense existed, and where the evidence fails to meet that test, it is insufficient to support a conviction.
2. ———. The general rule is that where carnal knowledge is accomplished after a woman yields because of fear caused by threats of immediate great bodily injury or death, the consummated act is rape.
3. ———. The degree of force required is relative, depending upon the particular circumstances, but in any such case it must be sufficient to subject and put the dissenting woman within the power of the man, and thus enable him to have carnal knowledge of her, notwithstanding good-faith resistance on her part.
4. **Criminal Law.** Where competent evidence is adduced to support every element of the offense charged in a criminal prosecution, it is ordinarily for the jury to determine if the offense has been established by evidence beyond a reasonable doubt.
5. **Rape.** An instruction in a prosecution for rape which in general terms calls attention to the function of the jury as the triers of the facts, and directs that facts, circumstances, and considerations not disclosed by the record may not be taken

into account is sufficient as a cautionary instruction.

6. **Criminal Law.** Where the evidence is insufficient to support a finding of a lesser degree than that charged in the information, it is not error to refuse to give an instruction defining the lesser offense.

ERROR to the district court for Scotts Bluff County: CLAIBOURNE G. PERRY, JUDGE. *Affirmed.*

Dwight Elliott and *Loren G. Olsson,* for plaintiff in error.

Clarence S. Beck, Attorney General, and *Homer L. Kyle,* for defendant in error.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, WENKE, and BOSLAUGH, JJ.

YEAGER, J.

This is a criminal action wherein, in the district court for Scotts Bluff County, Nebraska, Robert Fulton, plaintiff in error, who will hereinafter be referred to as the defendant, was charged by information in the name of the State of Nebraska with the crime of rape. He was convicted on a trial to a jury and sentenced to serve a term of 3 years. A motion for new trial was filed which was overruled. The defendant has brought the case here for review by petition in error. By the petition he contends that the judgment and sentence were erroneous and that the judgment should be reversed.

The substance of the assignments of error is: (1) That the evidence is insufficient to sustain the charge; (2) that the court erred in giving one instruction requested by the State; and (3) that the court erred in refusing to give two instructions requested by the defendant.

The rules for the determination of whether or not the evidence in a prosecution for rape is sufficient to sustain a conviction are not doubtful or difficult of understanding. One of these rules is the following: "In a prosecution for rape, competent evidence must show beyond a reasonable doubt not only that the defendant committed

the act charged but that he did so under such circumstances that every element of the alleged offense existed, and where the evidence fails to meet that test, it is insufficient to support a conviction." Cascio v. State, 147 Neb. 1075, 25 N. W. 2d 897.

Another rule is the following: "The general rule is that where carnal knowledge is accomplished after a woman yields because of fear caused by threats of immediate great bodily injury or death, the consummated act is rape." Cascio v. State, *supra.*

Another rule is the following: "The degree of force required is relative, depending upon the particular circumstances, but in any such case it must be sufficient to subject and put the dissenting woman within the power of the man, and thus enable him to have carnal knowledge of her, notwithstanding good-faith resistance on her part." Cascio v. State, *supra.* See, also, Brockman v. State, *ante* p. 171, 79 N. W. 2d 9.

Still another rule is the following: "Where competent evidence is adduced to support every element of the offense charged in a criminal prosecution, it is ordinarily for the jury to determine if the offense has been established by evidence beyond a reasonable doubt." Brockman v. State, *supra.* See, also, Starnes v. State, 148 Neb. 888, 29 N. W. 2d 795.

The prosecutrix gave testimony positively, the important details of which are, that around 5:30 a.m. on January 1, 1956, the defendant came to her home where she was with her two children; that the children were respectively of the ages of about 2 years and 1 month; that he entered without invitation and that his presence was not discovered until she heard him in the house; that he possessed himself of a gun which he found in the house which he threatened to use unless she acceded to his demands; that he forcibly and against her resistance removed her clothing which consisted of a robe and pajamas; that he threw her upon a bed or couch and attempted to force accession; that he choked her and placed

his knee upon her stomach; that as a consequence of all this her power of resistance was overcome and he had intercourse with her; and that after the act and before he left the house she went to a neighbor's house and called attention to the occurrence in her home.

The defendant testified in his own behalf. He admitted that he had intercourse with the prosecutrix at the time and place charged in the information. He testified however that it was with consent and without resistance on the part of the prosecutrix.

Under the evidence adduced and the controlling legal principles there was presented a question of fact to be determined by the jury. The jury by its verdict resolved that question in favor of the State and against the defendant. No reason is apparent why the action of the jury should be disturbed.

As pointed out, the refusal to give two instructions is assigned as error. The first one to which attention is directed is No. 1. The defendant insists that the following portion of it should have been given: "The charge made against the defendant is in its nature a most heinous one and well calculated to create strong prejudice against the accused, and the attention of the jury is directed to the difficulty, growing out of the nature of the unusual circumstances connected with the commission of such a crime, in defending against the accusation of rape. It is your duty to carefully consider all of the evidence in the case and the law as given to you by the court in arriving at what your verdict will be in this case."

In Reynolds v. State, 27 Neb. 90, 42 N. W. 903, 20 Am. S. R. 659, this court did condemn as prejudicial error the refusal to give an instruction containing substantially the same context as the first sentence of the foregoing quotation. The holding in that case had special reference to this context.

We do not think, however, in the light of the instructions given, that there was any prejudicial error in the refusal to give this portion of the tendered instruction.

The directly condemnatory statement in Reynolds v. State, *supra,* appears in a syllabus point. The true effect of the holding when read with the opinion, we think, was to say that the attention of the jury must be called to the responsibility involved in the consideration of such a case, but it did not amount to an exaction that any particular formula should be employed so long as a properly admonitory instruction was given. To the extent that it appears to exact the giving of an instruction in this particular language it is overruled.

We think that the instructions in this case and particularly instruction No. 18 were sufficient. Instruction No. 18 in pertinent part is as follows: "Consider the importance of your function as jurors. You are the sole judges of the facts. Your decision on these facts is final. Thus, your position is of grave importance in the proper functioning of the court in the administration of justice. Your primary desire must be to reach a fair and just conclusion only from facts and circumstances in evidence. A consideration of facts and circumstances in evidence excludes sympathy or prejudice in reaching a conclusion."

The other instruction which the court refused to give on request of the defendant was one which, if given, would have permitted the jury in the event of failure to find the defendant guilty of rape to find him guilty of assault if the evidence was sufficient to sustain a charge of assault. We conclude that the refusal to give this instruction was not erroneous.

The court said in Torske v. State, 123 Neb. 161, 242 N. W. 408: "Where the evidence is insufficient to support a finding of a lesser degree than that charged in the information, it is not error to refuse to give an instruction defining the lesser offense." See, also, Fager v. State, 49 Neb. 439, 68 N. W. 611; Schultz v. State, 89 Neb. 34, 130 N. W. 972, 33 L. R. A. N. S. 403, Ann. Cas. 1912C 495.

On the record of the evidence made at the trial the

jury could properly have found the defendant guilty only of the crime with which he was charged or that he was not guilty. In the true aspect of the case there was no room for departure from this. The evidence was incapable of supporting any other or different finding.

The instruction given at the request of the State to which objection is made is instruction No. 10. It relates to testimony of the prosecutrix and of the defendant as to earlier sexual intercourse between these two parties. Their veracity is brought into question. The second paragraph of the instruction relates to this. It is as follows: "You must first decide whether or not such was forcibly and against her will, and you are further instructed that the law extends to all women, regardless of whether a woman may have previously consented to intercourse with a man, yet if she subsequently refuses to consent to intercourse, and he forces her he is guilty of rape. It is no defense that the complaining witness may have had previously submitted, if on the date as alleged in this complaint, she was forced to have intercourse with the defendant against her will."

Nothing has been found in this paragraph of the instruction which may be regarded as misleading or in any wise contrary to law. By the instruction as it is analyzed the jury was told that it was the judge of the credibility of the two witnesses, but even if it found that the prosecutrix had consented to intercourse on a previous occasion or previous occasions that could not be regarded as a defense in this case, notwithstanding such a finding, if it should be so found, if it found beyond a reasonable doubt that on the occasion in question the defendant had intercourse with the prosecutrix by force and against her will.

No prejudicial error having been found in the record the judgment of the district court is affirmed.

AFFIRMED.

CHAPPELL, J., participating on briefs.

CARTER, WENKE, and BOSLAUGH, JJ., dissenting:

This is a prosecution on a charge of rape. The defendant was convicted and sentenced to serve 3 years in the penitentiary. We are in agreement with what is said in the opinion affirming the judgment except as it relates to the sufficiency of the cautionary instruction given and the overruling of Reynolds v. State, 27 Neb. 90, 42 N. W. 903, 20 Am. S. R. 659.

The defendant requested a cautionary instruction which in part stated: "The charge made against the defendant is in its nature a most heinous one and well calculated to create strong prejudice against the accused, and the attention of the jury is directed to the difficulty, growing out of the nature of the unusual circumstances connected with the commission of such a crime, in defending against the accusation of rape." The trial court refused to give this portion of the tendered instruction and purported to cover the subject by an instruction reading as follows: "Consider the importance of your function as jurors. You are the sole judges of the facts. Your decision on these facts is final. Thus, your position is of grave importance in the proper functioning of the court in the administration of justice. Your primary desire must be to reach a fair and just conclusion only from facts and circumstances in evidence. A consideration of facts and circumstances in evidence excludes sympathy or prejudice in reaching a conclusion. It includes, however, a careful application by you of all the law contained in these instructions. Thus, it will be your duty to read these instructions after you retire and to use them as a guide in all your deliberations. Let your verdict reflect a deliberate judgment free from any influence other than the law and all facts and circumstances in evidence." We find no fault with this instruction as far as it goes. In our opinion, however, it does not cover the purpose of the requested instruction to which the defendant is entitled under the law of this state where a proper request is made therefor.

We submit that the instruction given by the trial court

does not contain the substance of the rejected instruction. It fails to caution the jury that prejudice was liable to be aroused against the accused because of the heinous nature of the crime charged in the information, or to call attention to the difficulty growing out of the nature and unusual incidents of the crime of defending against an accusation of rape, however innocent the defendant may be. In Reynolds v. State, *supra,* the court said: "The fact that the charge itself will frequently raise a clamor among ignorant and easily biased persons has been recognized by fair-minded judges and law writers from the time of Chief Justice Hale, at least, until the present time. * * * He (Chief Justice Hale) says: 'I only mention these instances that we may be more cautious upon trials of offenses of this nature, wherein the court and jury may with so much ease be imposed upon without great care and vigilance.'" The refusal to give such an instruction upon request has constituted prejudicial error in this state since Reynolds v. State, *supra,* adopted in 1889. The lack of cases dealing with the rule in this state evidences its general application and acceptance over the years.

We point out that although the testimony of a prosecutrix must be corroborated to some extent, yet essential elements of the crime are necessarily supported only by her uncorroborated testimony. Many reasons exist why such uncorroborated evidence should be most carefully scrutinized and the jury cautioned about permitting prejudice to creep into their deliberations. It is a fact, well known to fair-minded judges and lawyers, and others as well, that the evidence of a prosecutrix in this type of case is often influenced by a stricken conscience, a fear of inquiry and discovery, or possible pregnancy. Arguments of counsel are not ordinarily effective in securing for the defendant the careful and impartial consideration of such evidence to which he is entitled. An instruction by the court is much more likely to do so. The rule is one for the protection of the inno-

cent and can afford no comfort to the guilty. The overruling of Reynolds v. State, *supra,* insofar as it conflicts with the present case, eliminates the necessity for giving any such cautionary instruction in the future, with or without request. It, in fact, has the effect of eliminating any necessity for a cautionary instruction in any type of case under any and all circumstances, whether requested or not. It destroys the beneficent purposes of a rule bordering on a substantial right in this type of case, which has stood as a protection to the innocent for almost 70 years. No reason is given in the opinion for this departure from the time-honored rule. For aught the opinion shows, there has been no consolidation of thought or reason by the majority as to why this landmark of the criminal law of this state should be so inconsiderately stricken down. No change of condition is pointed out, no failure of its purpose noted.

We submit that such changes in our criminal law for the asserted reason that the refusal of the tendered instruction does no prejudicial harm to the defendant is a mere speculation as to what effect the jury might have given to it. In determining that the refusal could have no prejudicial effect upon the jury, the court usurps the duty of the jury to apply it to the evidence. It amounts to a declaration that trial courts may hereafter with impunity disregard the substantial rights of a defendant in this type of case. This long-established rule had for its objective the protection of the innocent against prejudice and resulting injustice. It conforms to the purposes of the law to see that justice is done in all cases and to alleviate the danger that innocent persons may suffer because the jury may be swayed by matters inducing other than a fair and impartial consideration of the evidence before it. The abrogation of the rule, in our opinon, is a backward step in the development of the judicial process and can only result in less assurance of a fair and impartial trial in this type of case.

We have searched the record in vain for evidence that the requested instruction was otherwise covered by the trial court in his instructions to the jury. We find nothing that even remotely refers thereto. The refusal to give the requested instruction is not cured by other instructions, either singly or as a whole. We unqualifiedly reject any contention made that the instructions as a whole were sufficient or that their sufficiency in other respects can by any process of reasoning justify an affirmance of the present case.

We submit that it was prejudicial error for the trial court to refuse to give the requested cautionary instruction, and that the judgment should be reversed and the cause remanded for a new trial.

JOHN K. DURFEE, ALSO KNOWN AS J. K. DURFEE, APPELLEE, v. L. N. RESS, DIRECTOR OF MOTOR VEHICLE DIVISION, DEPARTMENT OF ROADS AND IRRIGATION, STATE OF NEBRASKA, APPELLANT.

81 N. W. 2d 148

Filed February 15, 1957. No. 34098.

1. **Automobiles: Constitutional Law.** A license to operate a motor vehicle in this state is issued, not as a contract, but as a privilege, with the understanding that such license may be revoked for cause by the state.
2. **Automobiles: Statutes.** The revocation of a license to operate a motor vehicle in this state under the point system provided by statute is not an added punishment for the offense or offenses committed as a result of which the points are accumulated.
3. ———: ———. The purpose of the revocation of a license is to protect the public, and not to punish the licensee.
4. **Automobiles: Constitutional Law.** Where an operator's license is revoked under the point system and the statute providing the conditions under which the revocation may be suspended has been amended during the period of the accumulation of the points as a result of which the revocation occurs, the amended act controls. Such an application is not an ex post facto application within the prohibitions of the United States and the state Constitutions.

APPEAL from the district court for Douglas County: PATRICK W. LYNCH, JUDGE. *Reversed and remanded with directions.*

Clarence S. Beck, Attorney General, *Ralph D. Nelson*, and *Herbert T. White*, for appellant.

Brown, Crossman, West, Barton & Quinlan, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, WENKE, and BOSLAUGH, JJ.

SIMMONS, C. J.

The defendant, Director of the Motor Vehicle Division, Department of Roads and Irrigation, State of Nebraska, issued an order revoking the driver's license of the plaintiff for a period of 1 year from November 28, 1955, and refused to reinstate it upon plaintiff's offer to provide 3 years' proof of financial responsibility. Plaintiff brought this proceeding under section 60-420, R. R. S. 1943, challenging the validity of the orders of the defendant. In accord with the petition, the trial court stayed the order of revocation pending the final determination of the action.

The defendant demurred to the petition on the ground that it did not state facts sufficient to constitute a cause of action. The trial court overruled the demurrer. The defendant elected to stand on the demurrer and refused to plead further. Judgment was entered for the plaintiff. Defendant appeals.

We reverse the judgment of the trial court and remand the cause with directions to sustain the demurrer.

The facts are not in dispute. On December 16, 1953, plaintiff was convicted of the offense of drunken driving in violation of section 39-727, R. S. Supp., 1953. He was fined and his driver's license suspended for a 6-month period. At that time and since, the point system provided for 6 points for such a violation. Laws 1953, c. 219, § 1, p. 768; § 39-7,128, R. S. Supp., 1953.

On January 11, 1955, plaintiff pleaded guilty to the offense of speeding and was fined. At that time and since, the point system provided 3 points for such violation. Laws 1953, c. 219, § 1, p. 768; § 39-7,128, R. S. Supp., 1953. Also at that time and since, section 39-7,129, R. S. Supp., 1953, provided that whenever any person shall have accumulated a total of 12 or more points within any 2-year period, the director "shall" revoke the person's license for a period of 1 year, subject to conditions not important here. During the time the 9 points were accumulated the statute provided: "Any license, revoked under the provisions of this act, shall remain revoked unless or until such person shall give and maintain for three years proof of financial responsibility, as required by section 60-525." Laws 1953, c. 219, § 6, p. 771.

Effective September 18, 1955, Laws 1953, chapter 219, section 6, was amended to provide: "It shall be unlawful to operate a motor vehicle on the public highways after revocation of an operator's license revoked under the provisions of sections 39-7,128 to 39-7,133. Any license, revoked under the provisions of sections 39-7,128 to 39-7,133, shall remain revoked for one year and at the expiration thereof such person shall give and maintain for three years proof of financial responsibility, as required by section 60-525." § 39-7,133, R. S. Supp., 1955.

On November 28, 1955, plaintiff pleaded guilty to "exceeding speed limit" and was fined $10 and costs. The point system provided 3 points for this violation. Plaintiff had accumulated 9 points prior to September 18, 1955, and 3 points thereafter. The mandatory revocation of his driver's license followed.

The issue actually presented here is not the validity of the order revoking the driver's license of the plaintiff but the refusal of the director to suspend the revocation under the provisions of Laws 1953, chapter 219.

To sustain the trial court's judgment plaintiff argues

here that when he accumulated the 9 points, Laws 1953, chapter 219, section 6, was in effect and that under it the revocation remained in effect only until such time as he gave the requisite proof of financial responsibility; and that under the provisions of section 39-7,133, R. S. Supp., 1955, the revocation must remain in effect for the period of 1 year before the giving and maintenance of proof of financial responsibility could revoke the suspension.

In order to reach the question submitted here, we assume, but do not decide, the construction plaintiff puts on the statutes quoted.

Plaintiff alleges that he was denied the right to have his driver's license reinstated upon providing the "three years proof of financial responsibility."

Plaintiff does not challenge the fact that he had accumulated the 12 points which authorized the defendant to revoke his driver's license. Plaintiff argues that when the 9 points were accumulated he had the right to have the revocation of his driver's license suspended by giving the required proof of financial responsibility; that to change that requirement to his disadvantage was to add to the penalty of the punishment after the first two violations had been committed and that to do so constitutes an unconstitutional ex post facto application of the amending act contrary to both the United States and the state Constitutions.

The revocation of the driver's license here involved is in no sense a penalty for the violation of the statutes or ordinances involved. The penalties provided therefor have been satisfied.

The net of this situation is that the plaintiff by his violations of the law has created a record upon which the state in the exercise of its police power has determined that his driver's license shall be revoked. The state has also determined the conditions under which that revocation may be suspended.

As we said in In re Estate of Rogers, 147 Neb. 1, 22 N. W. 2d 297, quoting from Bankers Trust Co. v. Blod-

gett, 260 U. S. 647, 43 S. Ct. 233, 67 L. Ed. 439: "The penalty of the statute was not in punishment of a crime, and it is only to such that the constitutional prohibition applies."

A license to operate a motor vehicle in this state is issued, not as a contract, but as a privilege, with the understanding that such license may be revoked for cause by the state. Smith v. State, 124 Neb. 587, 247 N. W. 421; Hadden v. Aitken, 156 Neb. 215, 55 N. W. 2d 620, 35 A. L. R. 2d 1003; Montgomery v. Blazek, 161 Neb. 349, 73 N. W. 2d 402.

In Prichard v. Battle, 178 Va. 455, 17 S. E. 2d 393, a person was convicted of the offense of leaving the scene of an accident. His driver's license was revoked as a result of the conviction. He was pardoned by the Governor. He contended that the revocation was a part of the penalty and that the pardon restored his right to operate his car free from the conditions of a bond that he had deposited. The court held that the revocation of the license was a measure flowing from the police power designed to protect other users of the highways. The court held: "The universal holding is that such a revocation is not an added punishment, but is a finding that by reason of the commission of the act or the conviction of the licensee, the latter is no longer a fit person to hold and enjoy the privilege which the State had theretofore granted to him under its police power. The authorities agree that the purpose of the revocation is to protect the public and not to punish the licensee."

The decision was followed with approval in Harrell v. Scheidt, 243 N. C. 735, 92 S. E. 2d 182; Parker v. State Highway Department, 224 S. C. 263, 78 S. E. 2d 382; and Prawdzik v. City of Grand Rapids, 313 Mich. 376, 21 N. W. 2d 168, 165 A. L. R. 1165. See 16A C. J. S., Constitutional Law, § 448, p. 159.

In Thompson v. Thompson, — N. D. —, 78 N. W. 2d 395, the court had this precise question before it. The

holder of a license was convicted in May 1955 of the offense of driving a motor vehicle while under the influence of intoxicating liquor. By an act effective July 1, 1955, conviction in a period of 18 months of two charges of driving a motor vehicle while under the influence of intoxicating liquor made revocation of the license mandatory. On August 16, 1955, the person pleaded guilty to the second offense. The court found that the plea of an ex post facto application of the statute in the constitutional sense had no merit. It held: "* * * the revocation or suspension of a license operates for the benefit of the public and is not intended as a penalty inflicted upon the license holder," and followed Pritchard v. Battle, *supra.*

We conclude that the revocation of a license to operate a motor vehicle in this state under the point system provided by statute is not an added punishment for the offense or offenses committed as a result of which the points are accumulated. The purpose of the revocation is to protect the public, and not to punish the licensee. Where an operator's license is revoked under the point system and the statute providing the conditions under which the revocation may be suspended has been amended during the period of the accumulation of the points as a result of which the revocation occurs, the amended act controls. Such an application is not an ex post facto application within the prohibitions of the United States and the state Constitutions.

Plaintiff relies largely upon State v. McCoy, 87 Neb. 385, 127 N. W. 137, 28 L. R. A. N. S. 583. There the charge was that the defendant had abandoned his wife and children. After the date of the alleged offense and before trial, the statute as to giving bond was amended so as to make it more difficult for the defendant to escape imprisonment. The statute authorizing suspension of the sentence limited the section prescribing the punishment. The decision has no application here.

The judgment of the trial court is reversed and the

cause remanded with directions to sustain the demurrer.

REVERSED AND REMANDED WITH DIRECTIONS.

CHAPPELL, J., participating on briefs.

CARL BELGUM, APPELLEE, V. CITY OF KIMBALL, KIMBALL COUNTY, NEBRASKA, A MUNICIPAL CORPORATION, APPELLANT, LOWELL J. WILLIAMSON, INTERVENER-APPELLEE.

81 N. W. 2d 205

Filed February 22, 1957. No. 34036.

1. **Municipal Corporations.** The power to create a municipal corporation is vested in the Legislature, and implies the power to create it with such limitations as that body may see fit to impose, and to impose such limitations at any stage of its existence.
2. **Statutes.** In construing statutes, the legislative intention is to be determined from a general consideration of the whole act with reference to the subject matter to which it applies and the particular topic under which the language in question is found, and the intent so deduced from the whole will prevail over that of a particular part considered separately.
3. ———. Provided always that the interpretation of a statute is reasonable and not in conflict with legislative intent, it is a cardinal rule of construction of statutes that effect must be given, if possible, to the whole statute and every part thereof and it is the duty of the court, so far as practicable, to reconcile the different provisions so as to make them consistent, harmonious, and sensible. Just as an interpretation which gives effect to the statute will be chosen instead of one which defeats it, so an interpretation which gives effect to the entire language will be selected as against one which does not.
4. **Municipal Corporations: Mines and Minerals.** By statute, the governing board of a city is authorized and empowered to lease lands under its control for oil and gas exploration and development.
5. ———: ———. By statute, the governing board of a city is authorized in its discretion to enter into agreements for the pooling of acreage, or any part of the acreage, covered by leases granted for the production of oil and gas, and to provide for the apportionment of oil and gas royalties on a proportionate acreage basis.

6. ———: ———. Cities and towns in producing areas are authorized to enact ordinances limiting the number of wells that may be drilled within defined areas, requiring pooling of small tracts, and requiring permits to drill within the corporate limits.
7. **Mines and Minerals.** The term "mineral" ordinarily embraces oil, petroleum, and natural gas.
8. **Municipal Corporations.** At common law the dedication of a street or alley passed to the municipality merely an easement. The dedicator still continued to own the fee, subject to the easement. A deed of an abutting lot passed the title to the center of the street, or included the entire street as the case might be, burdened, of course with the easement.
9. ———. The Legislature may alter common-law rules of conveyancing, as well as the character and quality of the estates thereby created, and thus has the power to prescribe the legal effect of voluntary dedication of streets and alleys to a municipality and to prescribe the quantity of interest in the streets and alleys the dedicator parts with as well as that taken by the public.
10. ———. The acknowledgment and recording of a plat laying out land into lots and blocks and showing thereon the streets and alleys, under section 17-417, R. R. S. 1943, operates as a dedication which is equivalent to a deed in fee simple to such portions of the premises platted as is on such plat set apart for streets and alleys for public use to the municipality.
11. ———. Under section 17-558, R. R. S. 1943, whenever any avenue, street, alley, or lane shall be vacated the same shall revert to the owners of adjacent real estate, one-half on each side thereof.
12. ———. A plat made and recorded in statutory form since the enactment of sections 17-417 and 17-558, R. R. S. 1943, is subject to the provisions of both sections which must be considered in pari materia.
13. ———. While the equivalent to a deed in fee simple to the streets and alleys on a plat is vested in a municipality under section 17-417, R. R. S. 1943, such fee is a qualified, base, or determinable fee which may be continued forever if the streets and alleys be devoted to the public use, and such fee is determined by the vacation of streets and alleys by the municipality as provided for in section 17-558, R. R. S. 1943.
14. **Municipal Corporations: Mines and Minerals.** Where the fee to streets and alleys, and not merely an easement therein, is vested in the municipality, it owns the minerals under the surface of the streets and alleys, and the adjoining lot owners would have no

right, title, or interest in said minerals until such streets and alleys are vacated by the municipality as provided for by law.

APPEAL from the district court for Kimball County: ISAAC J. NISLEY, JUDGE. *Reversed and remanded with directions.*

Bernard F. O'Brien, for appellant.

Philip M. Everson, Eric E. Smith, and *Collins, Hughes, Martin & Pringle,* for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

MESSMORE, J.

This is an action for a declaratory judgment brought by the plaintiff, Carl Belgum, in the district court for Kimball County, against the City of Kimball, a municipal corporation located in Kimball County, Nebraska, defendant. The purpose of the action was to have declared the rights, status, and other legal relations of the plaintiff and the defendant city as to the oil, gas, and other minerals in and under the streets and alleys lying adjacent to real estate owned by the plaintiff and located within said city. The trial court entered judgment finding that the defendant city of Kimball had no interest in the oil and gas which had been produced or which in the future might be produced from the streets and alleys within the defendant city, and that the plaintiff was entitled to the oil and gas produced from under the streets and alley to the center of said streets and alley which lie adjacent to and abut upon his real estate.

The defendant city filed a motion for new trial. From the order overruling the motion for new trial, the defendant city appealed.

The case was tried upon a stipulation of facts agreed to by Carl Belgum, the plaintiff, the city of Kimball, a municipal corporation, defendant, and Lowell J. Williamson who intervened in the case, in substance as fol-

lows: The plaintiff is the owner, in fee simple, of Lot 14, Block 15, South Park Addition to the city of Kimball, Kimball County, Nebraska. The dimensions of the said lot are 40 feet north and south and 140 feet east and west. Pennsylvania Avenue is a street within the corporate limits of defendant city and is 80 feet in width. Pine Street, which is also a street within the corporate limits of defendant city, is 80 feet in width. The plaintiff's lot is bounded on the north by Pennsylvania Avenue, on the west by Pine Street, and on the east by a public alley which is 20 feet in width. The defendant is a municipal corporation incorporated under and by virtue of the laws of the State of Nebraska under the name of the Village of Kimball, Kimball County, Nebraska, on February 18, 1889, and since that time has continued to exist as a municipal corporation. On December 3, 1920, the defendant city became a city of the second class and has remained so ever since. On May 28, 1888, the then fee simple owners of the south half of the northwest quarter of Section 32, Township 15 North, Range 55 West of the 6th Principal Meridian, then Cheyenne County, Nebraska, now Kimball County, Nebraska, did plat said real estate into lots, blocks, and dedicated streets and alleys as provided by law, to be known as South Park Addition to Kimball. All of said South Park Addition to Kimball is included within the corporate limits of defendant city. The streets and alleys of said South Park Addition to Kimball at all times have been, and now are, used by the public as streets and alleys for the purpose of vehicular and foot traffic and for the construction of public utilities therein and thereon. On December 1, 1954, the intervener obtained an oil and gas lease from the plaintiff, together with other property owners in South Park Addition to Kimball, which is in full force and effect. On January 17, 1955, the governing body of defendant city adopted and approved ordinance No. 140 regulating development, drilling, and operations for oil and gas within the corporate

limits of the city. The real estate owned by the plaintiff as hereinabove described is located within the boundaries of drilling block E of ordinance No. 140. In accordance with the provisions of ordinance No. 140 the governing body of the city granted to the intervener a permit to drill a test well for oil and gas upon real estate belonging to the plaintiff. On February 3, 1956, the intervener secured an oil and gas lease from the governing body of the city which covered the streets and alleys abutting the plaintiff's real estate hereinabove described, together with streets and alleys abutting other real estate within South Park Addition. In accordance with the permit so granted, the intervener did drill a test well upon the real estate belonging to the plaintiff as hereinabove described and did establish production of oil from said real estate. Since the establishment of production of oil from said well, oil has been produced and is continuing to be produced from said well which has been placed on the market for sale, and the intervener is ready and willing to make, or cause to be made, in accordance with the provisions of ordinance No. 140, the division of the oil and gas produced from said well to the parties entitled thereto.

It is further stipulated by the parties that exhibit A, attached to the plaintiff's petition, is a true and correct copy of the plat and dedication of South Park Addition to the city of Kimball; that exhibit B, attached to the plaintiff's petition, is a true and correct copy of the oil and gas lease obtained by the intervener from the plaintiff; that exhibit C, attached to the plaintiff's petition, is a true and correct copy of ordinance No. 140 which was, as of date of trial, in full force and effect; and that exhibit A, attached to the intervener's petition of intervention, is a true and correct copy of the oil and gas lease secured by the intervener from the defendant city.

The dedication shows that the original owners of the land shown in the plat, having theretofore laid out an addition to the town of Kimball in Cheyenne County,

Nebraska, named South Park Addition to Kimball, and having caused the same to be surveyed and staked into lots, blocks, streets, and alleys, and a plat thereof to be made with reference to known monuments, accurately describing all the subdivisions of each tract numbering the same by progressive numbers and giving the dimensions and length thereof and the breadth of all the streets and alleys therein, made known that such subdivision was with their free consent and in accordance with the desires of the owners, and the streets and alleys were dedicated perpetually to the public use.

The instrument referred to in the agreed statement of facts, dated December 1, 1954, is titled "Community Oil and Gas Lease" between the lessor, whether one or more, and Lowell J. Williamson, lessee. Besides the plaintiff, there were other parties who entered into this lease. The lease gives the lessee the exclusive right to prospect, explore, or to mine for petroleum products and gas, and in the event of producing oil or gas in paying quantities, then the lessee was to pay royalties as designated in the lease to the respective parties as lessors in their proportionate share, as they agreed in the lease to pool their shares according to the amount of land owned by them as described in the lease.

City ordinance No. 140, referred to in the agreed statement of facts, limits the number and regulates the spacing, drilling, and operation of gas and oil wells and the incidental facilities within the city and, as incident thereto, provides for a fair and just participation in the limited number of wells so drilled and in the production from such wells. The ordinance likewise creates drilling blocks; provides that the lands within the corporate limits of Kimball be divided into drilling blocks designated A to O, of approximately 40 acres; and requires a permit before any drilling operation may be had on any of such drilling blocks. It then provides: "All production from any well drilled on any such drilling block, * * * shall be apportioned among and allocated to

the several separately owned tracts within such drilling block * * *."

On February 3, 1956, the governing body of the city entered into an oil and gas lease, as lessor, with Lowell J. Williamson, the intervener, as lessee. This lease provided that for and in consideration of $1,000, the receipt of which was acknowledged, the lessor, by the lease, let and granted unto the lessee the exclusive right to prospect, explore, drill for, mine, operate, produce, store, and remove from the premises oil, gas, casinghead gas, and all petroleum and gas products from land which is described in the lease constituting drilling blocks E to M, and set forth the description of the land in each drilling block, all of which land was located within the city of Kimball. The lease also provides that the lands described therein have been divided into drilling blocks under the terms and provisions of ordinance No. 140 of the city of Kimball, and that the lease shall be considered as a separate lease on each of the drilling blocks described in the lease, to the extent necessary to comply with the terms and provisions of the city ordinance. The lease, in addition, provides: "In the event it is ultimately determined that lessor is the owner of oil and gas and other minerals in and under the streets and alleyways covered by this lease, any royalties to which lessor may be entitled from any drilling block or unit shall be prorated and reduced in the proportion that the number of square feet embraced in streets and alleyways in any such block or unit shall bear to the total number of square feet embraced in such drilling block or unit and it is specifically agreed by lessor that such oil and gas and other minerals underlying said streets and alleyways covered by this lease, if owned by the City of Kimball, shall be considered and construed as unitized with all other property included and embraced in any of the foregoing units for development and operation for oil and gas purposes * * *. This lease shall be considered and construed as a non-drilling lease, which

is to say that the same is given for the purpose of unit production, as outlined above, and lessee shall not drill any test wells or set any surface equipment on streets and alleyways covered by this lease."

It is apparent from the record that the parties to this action do not question the authority of the governing board of the city to enact an ordinance such as ordinance No. 140 heretofore referred to, or to lease lands over which it has control. Such authority is derived from section 57-218, R. R. S. 1943, which provides in part: "* * * the governing board of all cities, towns, counties, * * * are respectively authorized and empowered to lease lands under their control for oil and gas exploration and development."

Section 57-221, R. R. S. 1943, provides: "Such governing boards are respectively authorized in their discretion to enter into agreements for the pooling of acreage, or any part of the acreage, covered by leases granted pursuant hereto with other acreage for the production of oil and gas, which agreements shall provide for the apportionment of oil and gas royalties on a proportionate acreage basis."

Many cities and towns in producing areas have enacted ordinances limiting the number of wells that may be drilled within defined areas, requiring pooling of small tracts, and requiring permits to drill within the corporate limits. See 1 Summers, Oil and Gas (Perm. Ed.), § 83, p. 282, note 37, and cases cited thereunder.

The intervener's petition set up the lease between the intervener and the city, and alleged, as did the plaintiff in his petition, that the plaintiff is entitled to a judgment determining that the plaintiff have and receive his proportionate share of the oil produced from what is referred to in the plaintiff's petition as drilling block E, determined upon the basis that he is the owner of the oil, gas, and other minerals in, on, and under the alleys and streets lying adjacent to the property owned by him.

The city, by its answer, contends that it is the owner of the oil, gas, and other minerals lying in, on, or under the streets and alleys located within its corporate limits, including the streets and alleys located within the boundaries of drilling block E as referred to in the plaintiff's petition, and as such owner is entitled to receive its proper share of the proceeds from all oil, gas, or other minerals produced from drilling block E.

The defendant city assigns as error the ruling of the trial court in entering judgment that the city of Kimball has no interest in the oil and gas produced from under the streets and alleys within said city, and that the judgment of the trial court is contrary to law.

While there is apparently no issue raised in the instant case as to whether or not oil, petroleum, and natural gas are minerals, we believe that it would be proper to state that the term "mineral" ordinarily embraces oil or petroleum and natural gas. See 58 C. J. S., Mines and Minerals, § 2 (4), p. 22. See, also, White v. McVey, 168 Okl. 19, 31 P. 2d 850, 94 A. L. R. 656; Scott v. Laws, 185 Ky. 440, 215 S. W. 81, 13 A. L. R. 369; Luse v. Parmer (Tex. Civ. App.), 221 S. W. 1031; Annotation, 17 A. L. R. 156.

The sections of the statute involved in this action are 17-417 and 17-558, R. R. S. 1943. Section 17-417, R. R. S. 1943, deals with additions, plat, acknowledgment and recording, and effect. It provides: "The acknowledgment and recording of such plat is equivalent to a deed in fee simple of such portion of the premises platted as is on such plat set apart for streets or other public use, or as is thereon dedicated to charitable, religious or educational purposes."

Section 17-558, R. R. S. 1943, deals with streets, improving and vacating the same. It provides: "Second-class cities and villages shall have power to open, widen or otherwise improve or vacate any street, avenue, alley or lane within the limits of the city or village; and also to create, open, and improve any new street, avenue,

alley or lane; Provided, all damages sustained by the citizens of the city or village, or by the owners of the property therein, shall be ascertained in such manner as shall be provided by ordinance. *Whenever any avenue, street, alley or lane shall be vacated, the same shall revert to the owners of the adjacent real estate, one half on each side thereof.*" (Emphasis supplied.)

The source of section 17-417, R. R. S. 1943, is Laws of Nebraska 1879, section 106, page 234, and of section 17-558, R. R. S. 1943, Laws of Nebraska 1879, section 69, XXVII, page 216. The language appearing in both sections heretofore referred to remains the same at all times, and there have been no amendments to either of the above-cited sections.

"The power to create a municipal corporation is vested in the legislature, and implies the power to create it with such limitations as that body may see fit to impose, and to impose such limitations at any stage of its existence." Redell v. Moores, 63 Neb. 219, 88 N. W. 243, 93 Am. S. R. 431, 55 L. R. A. 740.

As stated in Lang v. Sanitary District, 160 Neb. 754, 71 N. W. 2d 608: "Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them. The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state." See, also, County of Johnson v. Weber, 160 Neb. 432, 70 N. W. 2d 440; Seward County Rural Fire Protection Dist. v. County of Seward, 156 Neb. 516, 56 N. W. 2d 700.

"In construing statutes, the legislative intention is to be determined from a general consideration of the whole act with reference to the subject matter to which it applies and the particular topic under which the language in question is found, and the intent so deduced from the whole will prevail over that of a particular part

considered separately." Lang v. Sanitary Dist., *supra*.

In the case of In re Application of Rozgall, 147 Neb. 260, 23 N. W. 2d 85, this court said: " 'Provided always that the interpretation is reasonable and not in conflict with the legislative intent, it is a cardinal rule of construction of statutes that effect must be given, if possible, to the whole statute and every part thereof. To this end it is the duty of the court, so far as practicable, to reconcile the different provisions so as to make them consistent, harmonious, and sensible. Just as an interpretation which gives effect to the statute will be chosen instead of one which defeats it, so an interpretation which gives effect to the entire language will be selected as against one which does not.' 59 C. J., Statutes, § 595, p. 995."

It is the plaintiff's contention that in the light of the foregoing authorities this court, in interpreting sections 17-417 and 17-558, R. R. S. 1943, must do so in pari materia, for the reason that both of said sections deal with the same subject matter and are a part of the same act relating to cities of the second class.

The defendant, in support of its contention, makes reference to what is now section 17-417, R. R. S. 1943, and the manner in which said section has been interpreted by this court.

In this connection, the defendant cites Carroll v. Village of Elmwood, 88 Neb. 352, 129 N. W. 537, 33 L. R. A. N. S. 1053. This was an action brought by a lot owner in the village of Elmwood to recover the value of grass or hay grown on a street of the village adjacent to his lots and appropriated by the village trustees to the use of the corporation. In July 1886, the owners of the land on which the village of Elmwood is situated duly caused the same to be surveyed and platted, and the plat acknowledged in the manner provided for by sections 8980 and 8981, Ann. St. 1909. After such acknowledgment they filed the plat for record as therein provided, and thus dedicated the streets and alleys as shown

on the plat to the public use as and for the village of Elmwood. Thereupon said village was organized and has existed and exercised the powers and duties of a municipal corporation. The plaintiff invoked the common-law rule that he was entitled to recover the value of the grass or hay growing in the village street, the natural production of the soil, appropriated by the defendants. In this opinion the common-law rule was stated as follows: "In 2 Dillon, Municipal Corporations (4th ed.) sec. 663, it is said: 'Where the public acquires only the use, and the fee remains in the original proprietor or abutter, the latter is considered to be the owner of the soil for all purposes not inconsistent with the public rights, and may maintain actions accordingly.' "

Other definitions of the common-law rule are stated in 16 Am. Jur., Dedication, § 56, p. 402: "By a common-law dedication, the fee does not pass. The public acquires only an easement or such an interest in the land as is necessary for its enjoyment of the use. The fee ordinarily remains in the proprietor, the public holding the easement in trust."

As stated in Prall v. Burckhartt, 299 Ill. 19, 132 N. E. 280, 18 A. L. R. 992: "At common law the dedication of a street or alley passed to the municipality merely an easement. The dedicator still continued to own the fee, subject to the easement. A deed of an abutting lot passed the title to the center of the street, - or included the entire street, as the case might be, - burdened, of course, with the easement."

Returning to the case of Carroll v. Village of Elmwood, *supra,* the court said: "In this state, however, a different rule prevails. Section 8982, Ann. St. 1909 (which is now section 17-417, R. R. S. 1943), * * *." The court then made reference to the case of City of Des Moines v. Hall, 24 Iowa 234, stating: "The law of Iowa on this subject is identical with the section of our statutes above quoted, and in that state it was held that laying

off and recording a town plat or an addition thereto under chapter 41 of the code of 1851 had the effect to vest in the corporation the fee-simple title to and exclusive right of dominion over the streets and alleys thus dedicated to public use, and that in such case neither the original proprietor nor his grantees have the right to the subterraneous deposits of coal within the limits of such street, and the corporation was allowed to maintain an action against the abutting lot owner for coal mined and taken by him from beneath the same." This court then said that it did not follow a rule announced in the case of City of Des Moines v. Hall, *supra,* to the extent of holding that the city would be entitled to minerals, if any should be found, underlying the surface of its streets. It might be stated at this point that the court did not have that issue before it to determine. The plaintiff contended that by the language of the dedication of the plat the original owners retained the title to the streets, and only dedicated the same to the public use. The court said: "The acknowledgment of the plat seems to be in the ordinary and usual form. It reads as follows: 'We, the undersigned owners and proprietors of the land included in the accompanying plat of Elmwood, Cass county, Nebraska, do hereby approve of the division of the grounds into lots, and ratify the said plat; and do hereby dedicate to the public use the streets and alleys as thereon shown, and in accordance with the survey thereof.' This dedication did not have the effect contended for by the plaintiff, and did not restrict the rights of the village or the public to a mere use and occupation of its streets, but was a sufficient compliance with the statute, and, when taken together with the survey, the filing and recording of the plat, operated as a conveyance of the streets designated thereon in fee simple to the corporation." The court further said: "It follows, therefore, that the village of Elmwood being the owner in fee of the streets upon which the plaintiff's lots abutted, it was entitled

to use and appropriate the grass or other natural products of the soil growing upon the surface thereof, and the plaintiff, having no legal title to the streets, could not maintain an action against the city for the conversion to its own use of any of such products."

The case of City of Wahoo v. Nethaway, 73 Neb. 54, 102 N. W. 86, was an action in ejectment instituted by the plaintiff, City of Wahoo, to recover a portion of two of its streets occupied by the defendants. The court said, quoting from Krueger v. Jenkins, 59 Neb. 641, 81 N. W. 844: "'It would seem that there is in this state much reason for holding that incorporated cities should, in actions relating to their streets, be subject to the operation of the statute of limitations. They own in fee simple the streets, alleys and other public places within their corporate limits. * * * They may maintain ejectment to recover possession of them; they may, speaking generally, vacate them either in whole or in part.'"

In the case of Carroll v. Village of Elmwood, *supra,* this court relied upon the case of City of Des Moines v. Hall, *supra,* which was decided in 1868. In that case an action was brought by the city to recover damages for coal mined and taken by the defendant from underneath the surface of the streets of the city. The streets had been laid off and platted in conformity with the statute of the state, and the city claimed that under the statute it had the fee simple title to the streets, and having such title, it might rightfully maintain an action against the dedicator or any other person who, without its authority, mined and took coal therefrom. The defendant denied that there was any statutory dedication, but contended that if there was, in law such a dedication did not give the city the right to the coal in the streets beneath the surface. The court held that there was a statutory dedication and that the city owned the coal and minerals in the streets beneath the surface, and had a right to maintain the action.

The Iowa Code of 1851, section 637, read as follows: "The acknowledgment and recording of such plat is equivalent to a deed in fee simple of such portion of the land as is therein set apart for public use, or is dedicated to charitable, religious or educational purposes." It is obvious that said section conforms to what is now section 17-417, R. R. S. 1943, and the section considered in the case of Carroll v. Village of Elmwood, *supra*. The Iowa court said: "Under this section, we suppose the public would get the same grade of title to the streets that charitable, religious or educational institutions would get to lots or grounds set apart to them. They stand precisely in the same category. It would be as unreasonable, as it is against the plainest meaning of the language in this section, to allow the proprietor of a town site, after recording a plat of the same, to go upon ground dedicated to charitable and religious purposes, and strip it of its timber, or of its coal, if perchance any should be found under the surface thereof. * * * And there is just as little reason to subject the dedication of streets to like interferences from the original proprietor. * * * And we are inclined to believe that it was the object of the legislature, in withholding the title of the streets from the lot owner, divesting the proprietor thereof, and placing it in the public, to give to the corporate authorities the fullest power and control over the same, which can arise from title, in order that all improvements of them as highways might be made without let or hindrance from any quarter. At all events, it is always the better and safer course to interpret a statute according to the natural import of the language used." Judge Dillon, in overruling a petition for rehearing, among other things, said: "The true view is, that, when land has been dedicated under the statute, without reservation, and the plat has been recorded and accepted in cases where an acceptance is necessary, the dedicator or his grantee has no special proprietary rights in the soil composing the streets, but the dominion of the

streets passes to the public authorities. No other view gives effect to the strong language of the statute, * * *. It is plain from this language, that such a dedicator parts with all of his special property rights in the streets, just as effectually as does an ordinary grantor, with perhaps the exception of a right of reverter to him or his assignee, in case the street should be vacated. * * * After such a dedication, he has no more right to interfere with the street than a stranger. If the city could maintain this action against a stranger, it can equally maintain it against the dedicator or his grantee."

We have set forth Nebraska cases indicating how this court interpreted what is now section 17-417, R. R. S. 1943, and the basis for such interpretation.

The plaintiff's position is that section 17-417, R. R. S. 1943, does not convey the fee simple title of the dedicated streets and alleys to the city; it merely grants to the city the right to the use of the surface and so much of the subsurface as may be necessary for municipal purposes; and that said section merely changed the common-law rule so as to divest the dedicator of all future interest in the streets and alleys.

In the case of Village of Bellevue v. Bellevue Improvement Co., 65 Neb. 52, 90 N. W. 1002, after Bellevue was incorporated as a city, the territory embraced within its limits was surveyed and platted. By dedication, various tracts of land were conveyed by the owners to the city for streets, alleys, etc., and the fee simple title vested in the public and has ever since so remained. Later the board of trustees passed an ordinance declaring it necessary and expedient for the public good to vacate certain streets and alleys. By the terms of subdivision XXVII, section 69, article 1, chapter 14, Comp. St. 1901, it was provided: "* * * whenever any avenue, street, alley, or lane shall be vacated, the same shall revert to the owners of the adjacent real estate, one-half on each side thereof." This section of the statute is the same as what is now section 17-558, R. R. S. 1943. The court said: "The

action of the board in vacating the streets under an ordinance passed in pursuance to statute, is judicial in its nature. By subdivision 28, section 69, the board has power 'to * * * annul, vacate or discontinue' any street, avenue, alley or lane 'whenever deemed expedient for the public good,' * * *." The court held that, where a village board, acting by virtue of statute, vacates a street, avenue, alley, or lane, the land within such street or alley reverts to the owners of the adjacent real estate, one-half on each side thereof.

It will be observed that in the above case the city did vacate certain streets and alleys. That is not true in the instant case.

The plaintiff cites 26 C. J. S., Dedication, § 50, p. 523, in furtherance of his contention, to show the extent of a city's interest in a dedication such as is involved in this case, as follows: "Under a statute which provides that the fee of the streets dedicated for public use shall be deemed public property and vest in the city, it has been held that the city acquires such an estate or interest as is reasonably necessary to enable it to utilize the surface and so much of the ground underneath as might be required for laying gas pipes, building sewers, and other municipal purposes, but the city does not acquire any estate or interest in the ores beneath the street."

The case of City of Leadville v. Bohn Mining Co., 37 Colo. 248, 86 P. 1038, 8 L. R. A. N. S. 422, is cited. Section 6 of the Act of 1877 provided: "All avenues, streets, alleys, parks, and other places designated or described as for public use on the map or plat of any city or town, or of any addition made to such city or town, shall be deemed to be public property, and the fee thereof be vested in such city or town." The court said that "street" means more than the surface, it means the whole surface and so much of the depth as is or can be used, not unfairly, for the ordinary purposes of a street. The Legislature intended, by the use of the term "street," to vest in the city such estate or interest as is reason-

ably necessary to enable it to utilize the surface and so much of the ground underneath as might be required for laying gas pipes, building sewers, and other municipal purposes. In other words, the Legislature used the term "fee," not according to its technical legal meaning, but as vesting in the city a complete, perpetual, and continuous title to the space designated as streets, so long as it used them for the purpose intended. "It seems clear to us, therefore, that the intent and purpose of our statute is to clothe the city in its governmental capacity with the entire title to the streets, as such, for public use, and not for the 'profit or emolument of the city.' It was plainly the intention of the dedicator to part with the title to so much of its property only as was necessary to effectuate the purpose of establishing certain streets and alleys, designated and described upon the plat, for public use, and to clothe the city with the absolute title thereto for that purpose only, and not to vest it with any estate or interest in the ores that may exist thereunder."

The plaintiff relies on the case of Mochel v. Cleveland, 51 Idaho 468, 5 P. 2d 549. In 1899, one Holcomb and his wife dedicated certain lots and streets to the city of Lewiston. An integral part of the tract dedicated consisted of a strip 80 feet wide running north and south, the west boundary line thereof constituting the west boundary of said subdivision. In 1922, the city, by ordinance, vacated the west 20 feet of Prospect Avenue and authorized the mayor and city controller to execute quitclaim deeds to the abutting landowners of the strip of Prospect Avenue thereby vacated and abandoned. The question presented was, did the city own the fee? The respondents relied upon C. S., § 4091, which is substantially like section 17-417, R. R. S. 1943, and provides as follows: "The acknowledgment and recording of such plat is equivalent to a deed in fee simple of such portion of the premises platted as is on such plat set apart for streets or other public use; or as is thereon dedicated to

charitable, religious or educational purposes." The court said: "This section taken from Nebraska in 1893 was theretofore appropriated from Iowa. In both states, this statute has been construed to pass to the city a fee simple absolute. (Lindsay v. City of Omaha, 30 Neb. 512, 27 Am. St. 415, 46 N. W. 627; * * *." The respondents contended that the Idaho court was bound by the statute so construed prior to its adoption by the State of Idaho. The court said, quoting from Shaw v. Johnston, 17 Idaho 676, 107 P. 399: "'While the acknowledgment and recording is equivalent to a deed in fee simple, it is not a deed in fee simple, and does not give the public the same right to sell or dispose of the same that a private party has to land for which he holds the title in fee simple.' * * * This court has consistently held that, while the construction placed upon their statutes by other states prior to our adoption of them, is greatly persuasive, it is not conclusive. And we have in divers instances refused to adopt the foreign construction." Reference is then made to C. S., § 3963, which provides and is analogous to section 17-558, R. R. S. 1943, that when any street, alley, avenue, or lane shall be vacated, the same shall revert to the owner of the adjacent real estate. The court went on to say: "Despite the fact that Nebraska had this identical statute when she announced the construction respondents contend for, we are not satisfied with the reasoning that in effect eliminates the word 'revert' therefrom, and of necessity substitutes therefor something entirely opposite. To go back does not mean to go forward. The city had title to the lands for public use only. When that use was abandoned, what did the legislators have in mind other than that the land should 'go back' to the dedicator or his successors? * * * This we think the proper construction. Not having a fee-simple title, the city could not by deed invest respondents with one; * * *."

The cited case is distinguishable from the case at bar

in that the city did vacate a portion of a street, and as a consequence the title reverted to the adjacent property owners, as provided by statute.

The question arises as to just what type fee is here involved. We believe there are cases that are applicable to the question here presented.

In Prall v. Burckhartt, *supra,* Prall brought an ejectment suit against Burckhartt and Carrithers to recover possession of a number of pieces of land which originally comprised streets and alleys of a subdivision platted by Prall. The question whether or not the judgment of the trial court should be sustained depended very largely upon the validity of section 2 of chapter 145 of the Illinois Revised Statutes, in relation to the vacation of streets. That section provided that when any street, alley, lane, or highway, or any part thereof, is vacated, the lot or tract of land immediately adjoining on either side shall extend to the center line of such street, alley, lane, or highway, or any part thereof, so vacated. It is apparent that the Illinois statute is very similar to section 17-558, R. R. S. 1943. The plaintiff owned in fee a tract of land which he subdivided into lots, blocks, streets, and alleys, and caused a plat of the subdivision to be recorded on June 25, 1889. The streets and alleys on the plat were accepted by the city of Fort Sheridan. Fort Sheridan had an interest in the tract of land constituting the public streets and alleys, either as owner in trust for the public, or as the owner of public easements. The provisions of the plat act and the vacation act were both in force and must be considered in pari materia, and it would seem to follow that Prall, the appellee, in making and recording the plat must have done so in contemplation of not only the plat act, but also the vacation act. Section 3 of the plat act provides now, as it did in 1889, that the execution and recording of a plat shall be held to be a conveyance to the municipality, in fee simple, of the streets and alleys shown on the plat. It will be observed that this Illinois section of

the statute is quite similar to section 17-417, R. R. S. 1943. The Illinois court, in construing that section, held it was not a fee simple title absolute, but a qualified, base, or determinable fee, which may continue forever, but is determined by the vacation of the plat. The fee vests in the municipality so long, and only so long, as the land is devoted to the public use. The court said: "The crux of the question here involved is whether, when a plat is vacated, the fee in the streets and alleys reverts to the dedicator or to the one who owns the adjoining land at the time of vacation. * * * It seems to have been early considered by the legislature of this State that the public interests would be better subserved if a municipality were to have a more complete control over its streets and alleys than was possible where it had only an easement therein. Accordingly, as far back as 1833 (Laws of 1833, p. 600,) the legislature passed an act embodying substantially the same provisions as those of section 3 of the Plat act, providing that the making and recording of a plat should be held to be a conveyance of the streets and alleys in fee to the municipality. Thereafter it was found that a new difficulty arose; that from time to time conditions changed, and that it might be desirable to vacate streets and alleys which had been dedicated by plat. The dedication and acceptance had vested a determinable fee in the streets and alleys in the municipality, and the question arose what was to become of the title to the land included in such streets and alleys when they were vacated. * * * The Vacation act was thus made as much a part of the statutory law relating to the making of plats and the devolution of the title to streets and alleys shown thereon as the Plat act had been. The two acts were simply two parts of one and the same subject matter. Both acts were necessary to express the entire legislative will in respect to the devolution of the title to the streets and alleys shown on the plat. The intention of the legislature manifested by these two statutes—the Plat act and the

Vacation act—seems perfectly plain and simple. So long as the strip of ground designated as a street on a statutory plat remained a street the determinable fee was to be vested in the municipality, but as soon as the street was vacated the title was to devolve in the same manner as it would have done if the plat were a common law plat. In this way it was manifest that all controversies over abandoned and vacated streets would be eliminated. In Thomas v. Hunt, 134 Mo. 392, the court, in speaking of a statute with substantially the some provisions, said: The statute 'is founded upon the same principle of public policy as the rule which under other circumstances vests in the abutting owners, respectively, the title to the center of the street.' If both the Plat act and the Vacation act be construed in pari materia, all plats thereafter made must be construed under both acts, and the dedicator, by the making and recording of the plat in statutory form, grants to the municipality the title to the streets and alleys shown upon the plat, to have and to hold the same in fee so long as the same shall be used for streets and alleys, but upon condition that in case any street or alley shall be vacated, then the title thereto shall pass, by way of a conditional limitation, to the then owners of the lots abutting thereon.

"The legislature has the authority to provide by statute that a fee may be limited upon a fee by deed. The methods of conveyancing and the character and quality of the estates thereby created are matters which are within the control of the legislature. * * * In upholding the validity of a similar statute the Supreme Court of Missouri in Thomas v. Hunt, supra, said on page 402: 'It is entirely competent for the legislature to prescribe the legal effect of voluntary dedication of streets and to prescribe the quantity of interest in the streets the dedicator parts with as well as that taken by the public.' "

In Matthiessen & Hegeler Zinc Co. v. City of La Salle, 117 Ill. 411, 8 N. E. 81, a controversy arose in respect to the rights in streets dedicated by a plat made by the

commissioners of the Illinois and Michigan canal under the Acts of 1836 and 1837. The Illinois court there decided that the fee of such streets was in the municipality, and that the owners of lots abutting thereon had no right to tunnel under the streets for the purpose of mining coal or other minerals. There had been no vacation of any of the streets involved, and therefore the provisions of section 2 of the vacation act had nothing to do with the controversy before the court. The court held that: "The acknowledgment and recording of a plat laying out land into lots and blocks, showing thereon the streets and alleys, by the statute operates as a dedication of the fee in the streets and alleys to the municipal corporation in which they are situate, the same as if made by a conveyance in the ordinary form. * * * The fee vested in the corporation by a statutory dedication is a qualified, base or determinable fee, which may continue forever, but is liable to be determined by some event or act circumscribing its continuance, as, for instance, by the vacation of the plat, or the entire and permanent abandonment and disuse of the street by the public and abutting lot owners. * * * A party owning city lots has not the right to make a subterranean passage from one to another through the underlying soil, etc., of a public street, the fee of which is not in him, in order to mine and remove minerals, etc., even though no injury may thereby result to the street, as such." The court went on to say: "The title vested in the town by the statutory dedication is absolutely for the purpose of the statutory trust until the street shall be subsequently vacated, when it will revert to the dedicator, or, it may be, in cases like the present, to the adjacent lot owner. Possibly, at some time in the future, there may be a reverter, but this is no reversion. 4 Kent's Com. (8th ed.) 372. It is too palpable for argument, that until there is a reverter, the lot owner can have no greater right to enter upon and appropriate the soil and minerals of the street to his personal use, than a stranger,

because his right can only commence in the event and at the time that the right of the town has ended."

In Union Coal Co. v. City of La Salle, 136 Ill. 119, 26 N. E. 506, 12 L. R. A. 326, affirming 34 Ill. App. 93, upon similar facts, it was expressly held that a city having the legal title to the land in its streets could maintain trespass for the removal of underlying coal by adjoining owners, although no actual damage had been done to the surface. See, also, Trustees of Hawesville v. Hawes' Heirs, 69 Ky. 232.

In Lambach v. Town of Mason, 386 Ill. 41, 53 N. E. 2d 601, the question involved was whether the plat dedicating streets to the town of Mason complied with the mandatory statute in such respect. It was held that it did not. The court said that where the fee to a street, and not merely an easement therein, is vested in the municipality, it owns the minerals under the surface of the street and lessees of the owners of the abutting lots have no right to take such minerals, but where the owners of the lots abutting on the street own the fee to the center of the street, their leases of the street abutting the lots convey all of the oil and gas in and under, or which may be produced from, that portion of the street. The court indicated that had the plat conformed to the mandatory statute, the landowners owning land adjacent to the streets would have no title or interest to the oil and gas beneath the streets.

In construing sections 17-417 and 17-558, R. R. S. 1943, in pari materia, it becomes apparent that it was the intention of the Legislature to create a qualified, base, or determinable fee in the city which may continue forever, but is liable to be determined by some event or act circumscribing its continuance, such as vacating a street or alley. In such event the title would revert to the adjoining property owners along the street to the center thereof. Such adjacent property owners would have no interest or any title in the streets and alleys of the city of Kimball until such time as the

streets and alleys of the city of Kimball may be vacated, as provided for by law.

We conclude that the adjacent property owners along the streets and alleys have no right or title to any oil or gas that may be beneath the streets and alleys of the city of Kimball as long as any such street or alley is used for the purpose as shown by the dedication, that is, to the public use, and not vacated by the city.

We hold that the city of Kimball has a right to share in the oil and gas which has been produced or which may in the future be produced from the streets and alleys within defendant city with the plaintiff in drilling block E, to the proportionate share as evidenced by its lease with the intervener, until such time as said streets and alleys may be vacated, as provided for by law.

For the reasons given herein, the judgment of the district court is reversed and the cause remanded with directions to enter judgment in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

DORA GIACOMINI, EXECUTRIX OF THE ESTATE OF GEORGE T. GIACOMINI, DECEASED, ET AL., APPELLANTS, V. CARRIE GIACOMINI ET AL., APPELLEES.

81 N. W. 2d 194

Filed February 22, 1957. No. 34051.

1. **Pleading.** More than one defense may be interposed to the same cause of action, provided they are not inconsistent with each other; they are not inconsistent unless the proof of one necessarily disproves the other.
2. **Limitations of Actions: Pleadings.** Generally, an answer setting up the statute of limitations and laches is not a technical plea of confession and avoidance; whether an answer of a supposed estoppel is so or not depends upon the nature of the matter alleged in the plea.
3. **Estoppel: Pleading.** A plea of estoppel in pais may be joined with a general denial when the averments by way of estoppel are not inconsistent with such denial.

4. **Trusts: Trial.** Generally, the burden of proof is upon one seeking to establish and enforce either a resulting or constructive trust to prove the same by a preponderance of evidence which is clear, satisfactory, and convincing in character.
5. **Executors and Administrators: Estoppel.** An executor or administrator, who receives and takes possession of property in his representative fiduciary capacity and permits the estate to be entirely administered without asserting any equitable interest in or ownership of such property except as a beneficiary under the will or an heir at law, is generally estopped in a collateral action to deny the title of his decedent or to set up an adverse title to the injury of those beneficially interested in the estate.

APPEAL from the district court for Douglas County: PATRICK W. LYNCH, JUDGE. *Affirmed.*

John P. Dalton and *M. L. Donovan,* for appellants.

Thomas P. Leary, for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CHAPPELL, J.

Plaintiff, Dora Giacomini, as executrix of the estate of George T. Giacomini, deceased, and individually as his widow and sole devisee in his will, brought this action against defendant, Carrie Giacomini, sister of George T. Giacomini, deceased, seeking a decree finding and adjudging that a resulting trust existed against described real estate known as the Lee Building in Omaha and against defendant as title holder thereof to the extent of an undivided one-half interest in favor of plaintiff and the George T. Giacomini estate. Plaintiff prayed for a decree quieting title thereto in her, together with an accounting of rental income from the premises, and equitable relief. The George H. Lee Company, Inc., was made a party defendant because it was a tenant in the premises. By order of court it has been paying its monthly rentals therefor to the clerk of the district court since November 1, 1954. Such defendant, hereinafter designated as Lee Company, is not otherwise interested or in-

volved in this litigation. The parties otherwise directly interested or involved will be designated as plaintiff and defendant, or by their first names. George T. Giacomini, deceased, will be designated as George, and his father, George Giacomini, will be designated as George, Sr.

Plaintiff's alleged right of recovery was substantially as follows: That for more than 20 years prior to the death of George's mother, Mary, on September 17, 1931, she and her daughters, Marie and Carrie, were each the record title holders of an undivided one-third interest in the Lee Building. However, plaintiff alleged that when Mary executed her last will on February 8, 1926, devising to Marie and Carrie each an undivided one-half interest to her undivided one-third interest in the Lee Building, it was orally understood and agreed that if George survived Mary he was to receive equal portions of Mary's estate with Marie and Carrie, which would have given George an undivided one-ninth interest in the Lee Building, and Marie and Carrie each an undivided four-ninths interest therein, although upon Mary's death record title thereto was to vest in Marie and Carrie. It was alleged that upon Mary's death and under the terms of her will duly probated record title to the Lee Building vested in Marie and Carrie until Marie's death July 17, 1947, but that theretofore from September 17, 1931, George had been in open, continuous, adverse possession of his alleged one-ninth interest in such premises until his death October 9, 1954. Also, it was alleged that on July 5, 1932, when Marie executed her last will devising an undivided one-half interest in the Lee Building and her estate to Carrie, it was orally understood and agreed that if George survived Marie he was to receive equal portions of her estate with Carrie, including an undivided one-half interest in the Lee Building, although the record title to such premises was to vest in Carrie. It was alleged that from and after Marie's death and the probate of her will, Carrie and George adopted and carried out a described plan for equalizing a division of

Marie's estate in accord with the aforesaid agreement, and that from July 17, 1947, George was in open, continuous, and adverse possession of his undivided one-half interest in the premises until his death. However, it was alleged that from and after George's death Carrie had attempted to repudiate and disclaim the trust relationship theretofore participated in by her.

Defendant Carrie answered, denying generally and specifically denying that she, Mary, Marie, or any of them ever held the Lee Building under any oral agreement or otherwise as trustee for George or that there was any consideration whatever for any such an alleged agreement. Defendant alleged substantially that she, Mary, and Marie purchased the Lee Building from the Lee Company on January 2, 1912, received a warranty deed thereto, and paid the entire consideration therefor; that Mary's undivided one-third interest therein was devised to Marie and Carrie equally by Mary's last will duly probated, which gave George a legacy of $1,000, made him a conditional residuary legatee and devisee of her entire estate, and nominated George and Marie as executors; and that Marie's will, duly probated, which made George a conditional residuary legatee and devisee of her entire estate and nominated George and Carrie as executors, devised Marie's undivided one-half interest in the Lee Building to Carrie.

Defendant alleged that George was proponent of both such wills; that he served respectively as executor in both estates wherein he listed the Lee Building as exclusively a part of the assets of both estates and took possession thereof as executor; that he filed petitions for final decrees in both estates and participated in so transferring and delivering the Lee Building first to Marie and Carrie and then to Carrie, in conformity with the wills; that in Mary's estate he was paid the bequest of $1,000 and signed a complete release of all claims against the estate; that he never filed any claim in either estate asserting that he had any interest in the

Lee Building; and by reason of said acts and conduct both George and plaintiff were barred and estopped in this collateral action from making any claim to the premises. Defendant alleged that she and her predecessors in interest, as owners, and her tenant the Lee Company, as lessee, had been in possession of the Lee Building ever since January 2, 1912, and denied that George ever had any possession thereof adversely or otherwise, but had always been simply the paid agent of Mary, Marie, and Carrie, or the survivor of them, and entrusted as such to manage the property and negotiate leases therefor; and that he always represented himself in writing and otherwise to be such agent, which barred him and his representative from making any claim to the subject matter of such agency. Defendant alleged that plaintiff's claimed cause of action was barred completely by the statute of frauds, the statute of wills, the statute of limitations, and the laches of plaintiff and George; that defendant and her immediate grantors always had an unbroken chain of title to, ownership, and possession of the Lee Building by themselves under the warranty deed from the Lee Company for more than 23 years; and that plaintiff should be put upon strict proof of every material allegation of her petition by clear, unequivocal, and convincing evidence, as required by law. Defendant prayed for dismissal of plaintiff's petition. Plaintiff's reply was a general denial.

After a trial upon the merits, whereat voluminous evidence was adduced, the trial court rendered a decree which found and adjudged the issues generally in favor of defendant Carrie and against plaintiff, primarily upon the ground that plaintiff had failed to prove by clear, satisfactory, and convincing evidence as required by law that either a resulting or constructive trust should be impressed in favor of plaintiff and George's estate upon the "West two-thirds (W 2/3) of Lot Three (3), Block One Hundred Fifty-one (151), Original City of

Omaha, * * * otherwise known as the George H. Lee Building at 1115 Harney Street, Omaha, Nebraska." It also found that under the evidence, even had any legal or equitable interest been established by plaintiff, the failure of George to bring an action to establish the same during his lifetime, and the laches of George and plaintiff, were sufficient to preclude equity from granting the relief sought. It further found that defendant Carrie had not by any plea of laches, estoppel, or waiver, relieved plaintiff from the legal burden of establishing her claim by a preponderance of evidence clear, satisfactory, and convincing in character. It ordered the rental income theretofore paid by Lee Company to the clerk of the district court to be paid forthwith to Carrie or her attorney. Thereafter plaintiff's motion for new trial was overruled and she appealed, assigning in effect that the findings and judgment of the trial court were not sustained by the evidence but were contrary thereto and contrary to law. We conclude that the assignments should not be sustained.

At the outset plaintiff assigned and argued that defendant, having pleaded laches, estoppel, and waiver, had admitted the facts alleged in plaintiff's petition. The contention has no merit under the pleas presented in this case. In such respect, plaintiff relied upon Anderson v. Anderson, 155 Neb. 1, 50 N. W. 2d 224, wherein we held: "Facts alleged in a petition to which the defendant in his answer pleads a waiver, an estoppel, or a matter to avoid, will be treated as admitted, though the answer also contains his general denial." Such holding was simply a general rule applicable and controlling the particular situation presented in that case, which is entirely distinguishable from that presented in the case at bar. Here we have no technical plea of waiver as such, so only the questions of laches and estoppel in pais are presented.

The general rule is that: "More than one defense may be interposed to the same cause of action, provided

they are not inconsistent with each other; they are not inconsistent unless the proof of one necessarily disproves the other." Colbert v. Miller, 149 Neb. 749, 32 N. W. 2d 500.

In Blodgett v. McMurtry, 39 Neb. 210, 57 N. W. 985, which presented comparable issues with regard to estoppel, this court held: "A plea of estoppel may be joined with a general denial when the averments by way of estoppel are not inconsistent with such denial." In the opinion it is said: "We have been unable to find any case holding that a plea of estoppel in pais cannot be joined with one amounting to a traverse, where the two are not in their natures inconsistent. Here they are not inconsistent."

In Webber v. Ingersoll, 74 Neb. 393, 104 N. W. 600, this court held: "An answer setting up the statute of limitations is not a technical plea of confession and avoidance; whether an answer of a supposed estoppel is so or not depends upon the nature of the matter alleged in the plea." Plaintiff cites no authority for her contention that a plea of laches constitutes a plea of confession and avoidance. In such respect, under the pleadings at bar, it appears to be generally analogous to a plea of the statute of limitations. Baxter v. National Mtg. Loan Co., 128 Neb. 537, 259 N. W. 630, cited with approval in Watson Bros. Transp. Co. v. Red Ball Transf. Co., 159 Neb. 448, 67 N. W. 2d 475.

With regard to a plea of the statute of limitations, the opinion in Webber v. Ingersoll, *supra*, said: "In effect, if not in form, the plea is that the plaintiff ought not to have or maintain his suit, because the facts out of which a cause therefor is alleged to have accrued are not averred to have taken place or did not in fact occur, if at all, within the period of limitation before the action begun. This plea is quite consistent with the contention that they did not take place at all, and the two issues may be, and usually are, tried as one. If the plaintiff fails to prove the existence of the requisite

facts, he, of course, fails to recover; but if he proves them, and it appears that their occurrence was too remote in time, he also fails." With regard to a plea of estoppel, that opinion said: "As to estoppels, there are several varieties of them. An estoppel, for instance, may consist of a waiver by which the plaintiff has foregone or abandoned a previously subsisting and valid cause of action; and a plea of such an estoppel of necessity confesses the existence of the facts, the effect of which, it is alleged, was afterwards waived. But there are other estoppels which arise out of the very transaction and circumstances upon which the plaintiff relies as affording him a ground of recovery, and a plea of such an estoppel, so far from confessing and seeking to avoid, amounts to a practical denial of the plaintiff's cause of action. And there is still another kind, in which it is averred that the conduct of the plaintiff since the alleged accrual of his supposed cause of action has been such as to lead the defendant to believe that it did not exist or would not be asserted, and that the latter has conducted his affairs accordingly, and that therefore whether the plaintiff has a good cause of action arising out of the facts alleged by him or whether he has not is immaterial, because he ought not in good conscience to be permitted to assert it. * * * In this last case, if the matter alleged in estoppel is sustained by sufficient proof, there is no occasion to inquire whether the averments of the plaintiff are true or false, but if the defendant fails in his proof, the plaintiff must still establish the truth of his averments, unless it is admitted otherwise by the plea of estoppel." The first kind of estoppel aforesaid appeared in Anderson v. Anderson, *supra*. The last two kinds appear in the case at bar, and the statements with regard thereto are applicable and controlling here.

On appeal to this court, actions in equity such as that at bar are triable de novo under the rule promulgated in

Wiskocil v. Kliment, 155 Neb. 103, 50 N. W. 2d 786, and other authorities too numerous to cite.

In Restatement, Trusts, ch. 12, p. 1249, it is said: "A resulting trust arises where a transfer of property is made under circumstances which raise an inference that a person making a transfer or causing a transfer to be made did not intend the transferee to have the beneficial interest in the property transferred. A constructive trust is imposed not because of the intention of the parties but because the person holding the title to property would profit by a wrong or would be unjustly enriched if he were permitted to keep the property. A constructive trust, unlike an express trust or resulting trust, is remedial in character."

It is now well established as a general rule that the burden of proof is upon one seeking to establish and enforce either a resulting or constructive trust to prove the same by a preponderance of evidence which is clear, satisfactory, and convincing in character. Holbein v. Holbein, 149 Neb. 281, 30 N. W. 2d 899; Peterson v. Massey, 155 Neb. 829, 53 N. W. 2d 912.

In 23 C. J., Executors and Administrators, § 372, p. 1158, citing Veeder v. McKinley-Lanning Loan & Trust Co., 61 Neb. 892, 86 N. W. 982, and other authorities, we find the general rule that: "If an executor or administrator receives property in his representative capacity, he is estopped afterwards to deny that it is property of the estate." In the cited opinion we said: "It must be borne in mind that the administrator acted with full knowledge of all the facts regarding his alleged equitable title. He deliberately chose the course of conduct adopted and followed, and now to permit him, or those claiming under him, to deny the title of the estate and claim through another source, is to invite and sanction a course of wrongdoing contrary to law and good morals. * * * The administrator must be held to be estopped by his own acts from now setting up a claim to the property in his own right."

In 33 C. J. S., Executors and Administrators, § 128, p. 1084, citing authorities, it is said: "A personal representative who takes possession of property in his fiduciary capacity is generally estopped to deny the title of his decedent or to set up an adverse title to the injury of those beneficially interested in the estate." Also, in Annotation, 146 A. L. R. 1182, citing Overlander v. Ware, 102 Neb. 216, 166 N. W. 611, and other authorities, it is said: "Estoppel to assert against a decedent's estate a claim antedating the decedent's death has been held to arise from statements or conduct on the part of the claimant inconsistent with such assertion."

In Overlander v. Ware, *supra,* this court said: "If Clark had believed, when Kelly died, that under the contract he was the owner of all the property, it is natural to suppose that he would have at once made claim to it upon the ground, as he was in duty and law bound to do if such was his claim. Instead, he makes application that letters of administration be granted, and permits the estate to be administered before asserting his rights. * * * The attitude of Clark in participating in the administration proceedings and in permitting final decree therein, without asserting his rights to any part of the estate except the 80 acres, estops him from asserting ownership of the entire estate. As to that portion of the estate, it amounts to an election on his part to take as heir and not as owner."

The foregoing rules and statements are applicable and controlling here, and in the light thereof, we have examined the record, which, summarized, fairly discloses the following: George, Sr., died intestate on June 25, 1900. He left a large estate consisting of personal property and various parcels of real estate in Omaha, including the west half of Lot 3 and all of Lot 4 in Block 41; Lot 6 in Block 89; and Lot 8 in Block 104, which he had owned for many years. His heirs at law were Mary, his widow, who never remarried; Anna, a married daughter sometimes designated as Mrs. E. E. Huntley;

Marie and Carrie, daughters who never married; and George, a married son. In that connection, George's first wife divorced him on January 2, 1903, for nonsupport, and he subsequently married Dora, the plaintiff, on September 1, 1936. Mary was administratrix of the estate of George, Sr. Under the statute of descent and distribution then in force, the property owned by him at the time of his death descended in equal shares to his four children, subject only to a life estate in a one-third interest by Mary, his widow. Subsequently it will be observed that George, Marie, and Carrie each acquired an undivided one-third interest in the real estate heretofore described, which was a part of their father's estate. It should also be noted here that the Lee Building; Lot 14, Block 1, Field Crest Addition to Omaha, the home of Mary, Marie, and Carrie on Walnut Street; Lot 5, Block 89; Lot 1, Block 57; Lot 4, Block 174, in Omaha; and other property unimportant here, were never owned by and never were any part of the estate of George, Sr.

In that connection, the record conclusively shows that on January 2, 1912, some 12 years after the death of George, Sr., the Lee Building was purchased from the Lee Company by Mary, Marie, and Carrie for $32,000, subject to a mortgage for $15,000, and as named grantees they then received a warranty deed thereto. They paid the entire consideration therefor, including the mortgage. George never paid any part thereof and was not a party thereto except that a final statement in purchase thereof designated him as rental agent. The Lee Company has been in possession of such premises as lessee ever since January 2, 1912, under numerous leases executed by it as lessee, and by Mary, Marie, and Carrie during Mary's lifetime, or by Marie and Carrie during Marie's lifetime, or by Carrie after Marie's death, as lessors. George generally negotiated such leases as the paid agent respectively for his mother and sisters, and his name appeared thereon as "George T. Giacomini, Agent,"

as it did in his bank account from 1924 to 1949, when it was closed after all property originally a part of his father's estate had been sold and George's salary as managing agent thereof had ceased. One such lease with Lee Company executed in 1951 designated Carrie and George "parties of the first part" as lessors, but upon discovery thereof by Carrie and notice to George, who made no known objection thereto, an extension thereof was duly executed by Carrie only upon condition that it should be understood that "parties of the first part" appearing in such lease referred only to Carrie as sole owner and lessor, with insurance payable to her only in case of loss. George was never in possession or had any right to possession of the Lee Building as lessor or owner. It was always understood that George, in dealing with the Lee Company, was only managing agent for his mother and sisters, to whom the rentals therefor were always paid. George never collected the Lee Building rentals. As a matter of fact, there is no evidence that George during his lifetime ever claimed to anyone, even his wife, the plaintiff here, that he owned any interest in the Lee Building. Plaintiff so admitted in her own testimony when she said: "And George never talked business to any living sole (sic) only his sister. He didn't tell anybody he owned the Lee Building or he didn't." Also, sometime after 1950, plaintiff told Carrie's niece, Mabel, that although George had never told her so, she thought that George owned part of the Lee Building. However, when Mabel called Carrie's attention to that conversation, she replied: "Marie and I owned it, and now I own it since Marie died."

Theretofore, Mary had purchased the residence property on Walnut Street in Omaha, where after 1918 Mary, Marie, and Carrie made their home during Mary and Marie's lifetimes, and where Carrie, 86 years old at the time of trial, still lived. Plaintiff makes no claim to any interest in that property, and George never did. In 1907

Marie and Carrie purchased Lot 1, Block 57, in Omaha, and sold it in 1944, yet plaintiff makes no claim that George ever had any interest in that property, and George never did. Concededly, he did not receive and was not entitled to receive any part of the proceeds of that sale. In 1935 Marie and Carrie purchased Lot 5, Block 89, in Omaha. In 1945 both such lot and adjacent Lot 6, Block 89, were sold for $35,000. Concededly at that time George had no interest in Lot 5, but he did then own an undivided one-third interest in Lot 6, which was originally a part of his father's estate. After appraisal of Lot 6 for $15,000, George was concededly allowed and paid $5,000 by Marie and Carrie for his one-third interest in Lot 6, but George, without any complaint, was allowed nothing for any interest in Lot 5, which belonged to Marie and Carrie.

On January 13, 1949, Carrie executed a will, subsequently revoked, which among other things gave George all of her real estate, including the Lee Building, if he survived her, together with all income from her bonds, stocks, and securities, until his death.

Subsequently, on February 23, 1949, after Marie's death, George was very ill, so upon advice of counsel, in order to facilitate administration of his estate, George and plaintiff, as husband and wife, executed a survivorship deed to themselves as joint tenants, thereby conveying an undivided one-third interest in and to the west half of Lot 3 and all of Lot 4, Block 41, and Lot 8, Block 104, in the city of Omaha, which were properties originally a part of the father's estate. However, no claimed interest in the Lee Building was included in that survivorship deed. Subsequently, when the west half of Lot 3 and all of Lot 4 in Block 41 were sold in 1949, after Marie's death, for $8,000, George then concededly owned only an undivided one-third interest therein. However, without any necessity and without any request or demand by George, he received from Carrie $4,000, which was one-half of the proceeds of the sale. The difference

was a gift to him by Carrie. Also, when Lot 8, Block 104, was sold in 1949 for $36,000, George concededly owned only a one-third interest therein. However, without any necessity and without any request or demand by George, he received $18,000 from Carrie, which was one-half of the proceeds of that sale. Again, the difference was a gift to him by Carrie.

When George, Sr., died in 1900, his son George was a druggist. Thereupon George sold out his business and never again had any steady employment outside the family. He supported himself with income from his own properties or interests therein, and by receiving a salary until 1949 for the management of the property and interests then belonging to his mother and sisters, for whom George acted as agent. The amount of his compensation as such agent depended upon the amount of rents collected, and such salary was either deducted by him from rents collected by him or otherwise paid directly to him.

After his divorce George sought the intimate society of women. At least one of them threatened him with lawsuits. In that connection, plaintiff offered in evidence several conveyances of George's interests in described properties which he owned or had received from his father's estate. Such conveyances, beginning in 1910 and ending August 3, 1935, were either from George to Marie and Carrie, or from Marie and Carrie back to him for only nominal considerations. Plaintiff claimed that they were attempts by George to protect himself against liability to that woman by making himself judgment proof. Be that as it may, on February 15, 1933, Carrie, with aid of George's counsel, obtained a written release from any liability by George to that named woman who had threatened to sue him for breach of promise, claiming "that an intimate relationship has existed between her and George T. Giacomini, of Omaha, Nebraska, for many years past." The consideration for such release was a cash payment of $1,740, and a prom-

issory note given for a like amount, due in one year and signed by George, Marie, and Carrie. In that connection, thereafter on August 3, 1935, more than a year before plaintiff Dora married George, all of his claimed interest in all of his property theretofore conveyed to Marie and Carrie had been conveyed back to George by them and there were no further title transactions between George and his sisters. It is interesting to note that although plaintiff claims that George had an interest in the Lee Building during that period of time, no mention was ever made of it in any of such conveyances aforesaid. Also, there is no clear, satisfactory, and convincing evidence of any agreement between George and Mary, Marie, and Carrie or any of them that George was to ever have or own any interest in the Lee Building or even that he had ever claimed to them or any other person that he owned any interest therein.

Mary, the mother, died testate on September 17, 1931. George, Marie, Carrie, Anna, and Anna's daughter Mabel, survived her. Insofar as important here, Mary's last will gave her daughter Anna $2,500, and her granddaughter Mabel $1,000. It devised her undivided one-third interest in the Lee Building to Marie and Carrie equally, or to the survivor of them, but George was to receive Mary's one-third interest if neither Marie nor Carrie survived testatrix. Mary's will devised to Marie and Carrie each an undivided one-half interest in Lot 14, Block 1, Field Crest Addition to Omaha, the home on Walnut Street, upon like survivorship terms and conditions. It devised all of her other separate property as follows: An undivided one-fourth interest to Anna and an undivided three-fourths equally to Marie and Carrie upon like survivorship terms and conditions. It gave George a legacy of $1,000, and appointed George and Marie as executors. George himself prepared and filed the petition for probate of her will. Thereafter it was admitted to probate and such executors were appointed. Their inventory of Mary's estate, duly prepared, signed,

acknowledged, and filed by them, listed, among other things, "An undivided one-third (1/3) interest in and to the West Two-Thirds (2/3) of Lot Three (3), in Block One Hundred and Fifty-one (151), Original City of Omaha, Douglas County, Nebraska," (the Lee Building) as belonging to Mary at the time of her death.

Anna was not satisfied with the provisions of Mary's will, so by way of compromise and settlement on June 23, 1932, she received the $2,500 legacy and a special warranty deed from Marie and Carrie to the south half of Lot 4, Block 174, original city of Omaha, in full and complete satisfaction of any and all claims which she then or thereafter had against Mary's estate. Also, on April 28, 1932, Anna, her husband, and George, conveyed to Marie and Carrie their undivided one-half interest in Lot 6, Block 89, and the west one-half of Lot 3, and all of Lot 4, in Block 41, original city of Omaha, which was property originally in their father's estate.

However, thereafter on August 3, 1935, Carrie and Marie deeded back to George a one-third interest in such described property. In that connection, the Lee Building was not in any manner involved in such transactions, and no claim for any interest therein was ever filed by George in Mary's estate. Rather, the final decree rendered therein assigned to Marie and Carrie each an undivided one-half interest in and to Mary's undivided one-third interest in the Lee Building, which resulted in Marie and Carrie each owning an undivided one-half interest therein. Such decree also approved the bequest of $1,000 to George who, on June 21, 1932, prepared, signed, and filed a receipt for payment thereof to him, which stated, "the same being payment in full of any and all sums due him under the will of Mary Giacomini, deceased, and in full payment of any and all claims of the undersigned against said estate." The executors were finally discharged on September 7, 1932. In that connection, defendant testified that George subsequently received his share and more of that portion of all

properties which were originally a part of his father's estate, because it belonged to him. However, the evidence clearly establishes that such division did not include but specifically excluded any interest in the Lee Building, the home on Walnut Street, and all other property which was subsequently purchased by and belonged to Mary, Marie, and Carrie, or the survivor of them.

Marie died testate July 17, 1947. Her will, executed July 5, 1932, gave $1,000 to Mabel, her niece, and $500 to her sister Anna if she survived testatrix, otherwise it became a part of Marie's estate. The residuary clause gave all of Marie's property to Carrie if she survived testatrix, otherwise to George. The petition for probate was filed by George and Carrie, who were nominated as executors. Marie's will was admitted to probate and such executors were appointed. Thereafter, George and Carrie duly prepared, signed, acknowledged, and filed a typewritten inventory of Marie's estate, listing therein among other things: "An undivided one-half interest in West Two-Thirds of Lot 3, Block 151, City of Omaha, being 1115 Harney Street, Omaha," (the Lee Building) as belonging to Marie at the time of her death. Previously, at the request of and for the benefit of counsel for the estate, a list of property belonging to Marie at the time of her death was made out by George in his own handwriting. It recited, among other things: "Invoice of the Estate of Marie Giacomini Deceased. Real Estate * * * W⅔ Lot 3 - Block 151 - 1115 Harney St - ½ Int." Also, with regard to its preparation, counsel for Marie's estate testified that in talking with George: "I asked him on the Lee Building at 1115 Harney, who owned it, and he said Marie owned a half of it and Carrie owned a half of it." Further, no claim for any interest in the Lee Building was ever filed by George in Marie's estate, and the final decree therein gave the residue of Marie's property, including Marie's undivided one-half interest in the Lee Building, to Carrie, whose title thereto

was then complete. The executors were discharged on April 19, 1948.

George died testate on October 9, 1954, when he was 81 years old. His will, executed September 4, 1947, gave his sister Anna $100 if she survived him, otherwise it was given to her daughter Mabel. It gave $100 to Carrie if she survived him, otherwise it was given to her niece Mabel. The residue of his estate, without description thereof, was given to plaintiff, his wife, who was named executrix. His will was duly probated and plaintiff was so appointed on December 15, 1954, after which plaintiff's second amended petition was filed herein.

At the time of trial Carrie was the only one of the immediate family surviving. The family was renowned for longevity. The mother, Marie, Carrie, and George were always affectionately, unselfishly, and loyally devoted to each other, with never a difference or controversy. Every day of his life that he was able to do so, George went to see his mother and sisters, or telephoned to them while they lived. He continued to do so with Marie and Carrie after his mother's death, and with Carrie after Marie's death. He acted as their agent in the management of their properties, and was paid a salary by them for doing so, until the properties originally belonging to their father's estate were finally sold in 1949. Years before that Carrie gave George a car. Over the years he needed more money than they were paying him, and when he asked for it, they gave it to him. He became ill about 6 years before his death and gradually got weaker and weaker until his death on October 9, 1954. Nevertheless, he was able on Friday and Sunday before his death to drive his car over to see Carrie, and he did so. Carrie paid all of his hospital bills over a period of 3 months in 1949. For many years Carrie and Marie had each given him $25 for Christmas, and after Marie's death in 1947, Carrie continued to give him $50 each Christmas until his

death. Shortly before his death, Carrie gave him $250 to have his car repaired.

During her lifetime, Marie generally handled all financial transactions for herself, Mary, and Carrie. In that connection, monthly rentals for the Lee Building were always paid to Mary, Marie, and Carrie, or the survivor of them. There is evidence that after 1942 when they were so paid, Marie would make a remittance to George of as much as one-ninth thereof. The last five of such monthly payments were consolidated as one and paid by Carrie on December 14, 1947. Plaintiff argued that payment of such portions of the Lee rentals, together with other related facts and circumstances, established that George respectively owned first an undivided one-ninth interest, then an undivided one-half interest in the Lee Building itself, as claimed by plaintiff. We do not agree. As we view it, such contention was not established by a preponderance of clear, satisfactory, and convincing evidence. In that connection, it will be noted that the amount of George's compensation as managing agent depended upon the amount of rentals collected, which he either deducted from the rents collected by him, or he was paid by Marie if Marie and Carrie collected it. Under the circumstances presented in this case, it is only logical to conclude that such payments made by Marie were compensation to George for his services as managing agent of the Lee Building. In other words, he had a compensatory interest in the Lee Building rentals but none in the building itself. To hold otherwise would be purely speculative and conjectural.

It was admitted by Carrie that beginning on March 8, 1948, after George's income had been reduced and plaintiff and George needed money, Carrie began giving George one-half of the monthly Lee rentals as a gift, and after George's income as agent had terminated in 1949, when the last properties belonging to his father's estate had been sold, George was ill and needed money,

so Carrie continued until the time of his death to give him one-half of the monthly Lee rentals as a gift. Carrie's unswerving devotion to and her prior charitable treatment of George, her only brother, together with other related evidence, gives such testimony credibility. True, it appears that in 1949, 1950, and 1951 George paid part of the taxes upon and some expenses for maintenance of the Lee Building, in order to help Carrie and get credit therefor in his income tax returns. However, it is established by a preponderance of the evidence that all such payments made by Carrie to George were gifts because he needed money; that he never in his lifetime had any agreement with or made any claim to Marie or Carrie or anyone else that he owned any interest in the Lee Building itself; and that he never had any such interest.

For reasons heretofore stated, we conclude that the judgment of the trial court should be and hereby is affirmed. All costs are taxed to plaintiffs.

AFFIRMED.

THE SCHOOL DISTRICT OF MCCOOK, IN THE COUNTY OF RED WILLOW, NEBRASKA, APPELLANT, V. THE CITY OF MCCOOK, NEBRASKA, APPELLEE.

81 N. W. 2d 224

Filed February 22, 1957. No. 34077.

1. **Municipal Corporations.** A city of the first class, under the police power delegated to it by section 16-246, R. R. S. 1943, may by ordinance employ parking meters to aid in the control and regulation of public streets if the ordinance is not arbitrary, oppressive, or discriminatory, and is reasonably calculated to accomplish the purposes of regulation.
2. **Constitutional Law: Municipal Corporations.** If such an ordinance is in fact a revenue measure, it is unconstitutional for the reason that it lacks the element of uniformity necessary to the validity of revenue enactments. A revenue tax may not be imposed under the guise of a police regulation.
3. **Municipal Corporations.** The placing of a coin in a parking

meter is not the payment of a toll or rental for the use of the parking space designated in a street. It is a regulatory device designed to discourage and prevent overtime parking and thereby expedite the free movement of traffic, the avoidance of congestion on the streets, and the abuse of parking privileges.

4. **Constitutional Law: Municipal Corporations.** The collection of money by a city, under an ordinance permitting its payment in a fixed amount within a specified time to avoid prosecution for the violation of a regulatory ordinance under the police power, is a penalty within the meaning of Article VII, section 5, of the Constitution.
5. ———: ———. The exactions involved in the present case are punitive in character, and not remedial or compensatory to the city, and as such are penalties arising under the rules, by-laws, and ordinances of cities as provided in Article VII, section 5, of the Constitution.
6. ———: ———. Article VII, section 5, of the Constitution, is a self-executing provision and funds within its provisions do not lose their character by being otherwise designated in an ordinance of a city.

APPEAL from the district court for Red Willow County: VICTOR WESTERMARK, JUDGE. *Reversed and remanded with directions.*

Russell & Colfer and *Mothersead, Wright & Simmons,* for appellant.

Stanley R. Scott, for appellee.

Jack M. Pace, Wayne R. Douce, and *Edward F. Fogarty,* amicus curiae.

Heard before CARTER, MESSMORE, YEAGER, WENKE, and BOSLAUGH, JJ.

CARTER, J.

This is an action for a declaratory judgment brought by the School District of McCook against the City of McCook for a determination that the money paid after a receipt of a violation notice under the parking-meter ordinances of the city of McCook are fines, penalties, and license moneys within the meaning of Article VII, section 5, of the Constitution of Nebraska. The trial

court found that such moneys were not within such constitutional provision and dismissed the action. The plaintiff has appealed.

The plaintiff is a duly organized and existing school district by virtue of Chapter 79, article 8, R. R. S. 1943, and will hereafter be referred to as the school district. The defendant is a city of the first class duly organized and existing under the laws of this state and will hereafter be referred to as the city. On January 13, 1947, the city first adopted a parking-meter ordinance which stated in part that it was for the purpose of defraying the cost of the city of regulating, supervising, and policing the exercise of the privilege of parking vehicles upon streets designated by the council. The ordinance imposed a fee for the parking of a motor vehicle on such streets during certain hours and provided that the operator, at the time of parking, deposit a coin in the meter. The parking space could then be lawfully occupied by said vehicle during the period of time allotted, according to the denomination of the coin deposited, as indicated on the meter. The ordinance also provided that it was unlawful for any motor vehicle to occupy a parking space where the meter showed it was illegally in use. The duty was placed upon the chief of police to keep a record of all violations and to attach a notice to unlawfully parked vehicles instructing the operator to report at the police station. There was no provision as to the procedure at the police station. The chief of police was charged with the collection of money from the meters for delivery to the city treasurer to be placed in a special parking-meter fund. The ordinance authorized the purchase of meters from this fund and that such portion of the fund as was deemed necessary could be used for the proper regulation, control, and inspection of traffic upon the public streets and to cover the cost of supervising, regulating, and inspecting the parking of vehicles in said parking zones, including the placing and maintaining of lines or marks in the parking-meter

areas. The penalty for the violation of the ordinance was a fine in any sum not exceeding $100 and commitment to the city jail until the fine and costs were paid.

On February 10, 1947, a supplemental ordinance was passed which provided that when a violator of the parking ordinance fails to appear within 3 days, a complaint shall be filed and a warrant issued. It also provided that any violator appearing within 3 days who desired to plead guilty could do so and pay $1 to cover the costs and expenses of administration.

It appears that on March 14, 1951, the city council, without ordinance, adopted the following: "It was further agreed to increase parking fines from five cents to twenty-five cents if paid within 24 hours, and $1.00 per ticket after 24 hours have elapsed, to be effective June 1, 1951." There is no evidence in the record as to the legal basis for the five cents collected prior to June 1, 1951.

On December 21, 1953, an amendatory ordinance was enacted which provided for the first time what should be done when the notice of violation was received by the operator. It provided that if the violator appeared at the police station within 24 hours after receiving the police tag, he should pay 25 cents, 10 cents of the amount to be deemed as payment of the parking privilege not previously paid and 15 cents as payment of operation and administrative expenses. If the violator appeared at the police station after 24 hours but within 72 hours, he should pay $1.25, 10 cents for the unpaid parking privilege and the balance for operation and administrative expenses. A failure to appear within 72 hours subjected the violator to a complaint and warrant of arrest for a violation of the ordinance.

The legality of the ordinances and other actions of the council are not here in question. The amounts collected from the several sources since 1947 are shown by the record. We do not deem it necessary to list them here. The record shows that since the enactment of the

first parking-meter ordinance but four complaints were filed and they were dismissed upon payment of the above charges.

The question presented is whether the moneys received by the city after a receipt of a violation notice under the parking-meter ordinances are within the provisions of Article VII, section 5, of the Constitution and therefore the property of the school district. The constitutional provision provides: "All fines, penalties, and license moneys, arising under the general laws of the state, shall belong and be paid over to the counties respectively, where the same may be levied or imposed, and all fines, penalties and license moneys arising under the rules, by-laws, or ordinances of cities, villages, towns, precincts, or other municipal subdivision less than a county, shall belong and be paid over to the same respectively. All such fines, penalties, and license moneys shall be appropriated exclusively to the use and support of the common schools in the respective sub-divisions where the same may accrue." This provision is self-executing and if the moneys involved are fines, penalties, or license moneys within its meaning, a judgment awarding them to the school district would be required. School District of the City of Omaha v. Adams, 147 Neb. 1060, 26 N. W. 2d 24.

We point out that public highways and streets are primarily for public travel. A reasonable use for such purpose includes temporary and reasonable stops as lawful incidents of travel. The growth of motor vehicle traffic has created difficult problems, particularly in areas where streets were laid out and constructed before the automobile became a common means of transportation. The need for regulation of motor vehicle traffic became a necessity. While we have no doubt that stops of reasonable length which do not interfere with the reasonable use of streets are incidents of the use of such streets, when such use overtaxes their capacity, the state in the exercise of its police power may

adopt reasonable regulations for the purpose of meeting the situation. We are in accord with the view that a city has the same right to regulate parking that it has to limit the speed of automobiles and to install traffic control signals, if the regulatory ordinance is not arbitrary, oppressive, unreasonable, or discriminatory. City of Hutchinson v. Harrison, 173 Kan. 18, 244 P. 2d 222; Andrews v. City of Marion, 221 Ind. 422, 47 N. E. 2d 968.

The city has no right to charge for the use of public streets. It may not lease nor rent the area within a public street nor charge a toll for the use thereof. Burlington & M. R. R. Co. v. Reinhackle, 15 Neb. 279, 18 N. W. 69, 48 Am. R. 342; Michelsen v. Dwyer, 158 Neb. 427, 63 N. W. 2d 513. See, also, William Laubach & Sons v. City of Easton, 347 Pa. 542, 32 A. 2d 881; Britt v. City of Wilmington, 236 N. C. 446, 73 S. E. 2d 289.

The general police power delegated to a municipality authorizes it to regulate its streets which, we think, would include the use of parking meters. Kimmel v. City of Spokane, 7 Wash. 2d 372, 109 P. 2d 1069; City of Bloomington v. Wirrick, 381 Ill. 347, 45 N. E. 2d 852. The legality of an ordinance providing for the use of parking meters is dependent upon the ordinary rules governing police regulations. Such an ordinance must not be arbitrary, oppressive, unreasonable, or discriminatory at the time of its enactment. It must be reasonably calculated to accomplish the purpose of regulation. If it is in fact a revenue enactment as distinguished from a purely regulatory measure it is clearly unconstitutional. Rhodes, Inc. v. City of Raleigh, 217 N. C. 627, 9 S. E. 2d 389, 130 A. L. R. 311. We necessarily conclude that a city of the first class is authorized by section 16-246, R. R. S. 1943, to enact a proper ordinance providing for parking meters as a regulatory measure. Wilhoit v. City of Springfield, 237 Mo. App. 775, 171 S. W. 2d 95. The constitutionality of the ordinances and actions of the city in the present case is not raised. We shall not, therefore, deal with the subject further.

We must assume the validity of the ordinances and actions of the city in dealing with the subject. No question is here raised as to the moneys collected from the meters except as it incidentally bears upon the nature of the moneys collected after a notice of violation has been appended to a motor vehicle for overparking. For the purposes of this suit, therefore, we shall treat the moneys collected as moneys constituting an integral part of the regulation, as provided in the ordinances enacted.

In its first cause of action the school district alleges that from February 10, 1947, to December 21, 1953, the city collected $1 from each violator whose motor vehicle was tagged for overparking if the violator appeared at the police station within 3 days, otherwise a complaint was filed. From March 1, 1947, until March 1, 1948, the city collected 5 cents for each violation if it was paid within 3 days. After March 1, 1948, the city collected 25 cents for a violation if the violator tendered it within 24 hours. It is the contention of the school district that these collections were fines, penalties, or license moneys within the meaning of Article VII, section 5, of the Constitution.

As we have heretofore said, the coins deposited in a parking meter under the provisions of the ordinance before us were an integral part of the traffic regulation. They are not deposited as rent or a toll for the use of parking space. Their purpose was a regulatory device to discourage and prevent overtime parking and thereby clear congested areas of motor vehicles, permit the free movement of traffic, and correct abuses of the parking privilege. Board of Commissioners of the City of Newark v. Local Government Board, 133 N. J. L. 513, 45 A. 2d 139. It is apparent, therefore, that the collection of the 5-cent and 25-cent charges were no part of the regulatory purpose of the ordinance, but were in fact penalties paid by the violator to purge himself of the charge of violating the overparking provisions of the

ordinance. The placing of coins in a parking meter is an integral part of the regulation. The payment of money after the violation within a fixed time to avoid a prosecution under the ordinance is penal in character. The differences are basic and controlling. The payment of the moneys here involved is in no sense remedial or compensatory to the city. Nothing is owed the city as rent or as a toll for the use of the parking space. The payment of money into parking meters is not compensation but regulation to discourage overtime parking. Opinion of the Justices, 94 N. H. 501, 51 A. 2d 836. The money here involved is no different than if it had been collected to purge oneself from overparking in violation of a police regulation where parking meters were not used.

The case of School District of the City of Omaha v. Adams, *supra,* is clearly distinguishable. That case involved the nature of a 50 percent penalty collected for failure to list intangible property for taxation. While it is punitive as to the wrongdoer, we held it to be compensatory to the state and the subdivisions thereof entitled to share in the tax for the delay caused by the failure to list for assessment purposes and the consequent derangement of tax records and collection processes. We said, also, that the more strict definition of "penalty" was intended, that is, the pecuniary punishment inflicted by a law, ordinance, or police regulation for its violation. The contention that the constitutional provision applies only to exactions resulting from a criminal proceeding is not tenable. The provision specifically provides that it should apply to rules, by-laws, or ordinances. It applies not only to fines and penalties assessed in criminal prosecutions, but also to fines and penalties that are assessed under rules, by-laws, and ordinances of cities which are criminal in character but collectible by civil actions. Unless such construction was intended, the last part of the first sentence of the constitutional provision would be wholly superfluous.

In the instant case, the moneys were paid as a punishment for violating a police regulation which was in no manner compensatory to the city. It was clearly a penalty within the meaning of the constitutional provision.

The second cause of action alleges that on December 21, 1953, the city by ordinance provided that after a motor vehicle was tagged for overparking, the violator could avoid the filing of a complaint by paying 25 cents within 24 hours or $1.25 within 72 hours. The school district contends that the amounts so collected are fines or penalties within Article VII, section 5, of the Constitution. For the reasons stated in disposing of the first cause of action, we hold the amounts collected under the foregoing provisions of the ordinance to be penalties within the constitutional provision.

The ordinance of December 21, 1953, also provided that 10 cents of each 25 cents or $1.25 collected shall be deemed to be in payment of the parking privilege not previously paid for, and the balance shall be deemed in payment of operation and administration expenses. The Constitution having provided that such penalties shall be paid over to the common schools, the city may not divert them to any other purpose. The fact that the ordinance of the city may designate a portion as compensatory and the balance for the cost of operation and administration cannot have the effect of changing the true character of these funds. If they be penalties under the constitutional provision, as they are, the city cannot change their character by giving them a name inconsistent with their true character. Since the Constitution is the supreme law of the state, any attempt by a city to make a distribution of funds contrary to its provisions is ineffectual and void.

We think the trial court was in error in holding that the school district had no right to the funds herein described. The judgment of the district court is reversed and the cause remanded with directions to the trial

court to enter a declaratory judgment in accordance with this opinion and such other relief as equity may require.

REVERSED AND REMANDED WITH DIRECTIONS.

CHAPPELL, J., participating on briefs.

LARRY ANDERSON, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

81 N. W. 2d 219

Filed February 22, 1957. No. 34118.

1. **Appeal and Error: Criminal Law.** A defendant in a misdemeanor case, desiring to appeal from a lower court to the district court, must substantially comply with the requirements of section 29-611, R. R. S. 1943, in order to give the latter court jurisdiction.
2. **Appeal and Error.** The record of the county court, as embodied in a duly authenticated transcript, imports absolute verity and cannot be contradicted in the appellate court by extrinsic evidence.
3. ———. When a transcript is filed in time, although incomplete, the appellate court acquires jurisdiction of the case.
4. ———. Where a party has, within due time, done all that he is legally required to do to perfect an appeal and no act or fault is shown on his part, or that of his counsel, which prevented the county judge from properly performing his duty in regard thereto, then the district court will not lose jurisdiction of the appeal merely by reason of the fact that the county judge filed an incomplete transcript.

ERROR to the district court for Sioux County: EARL L. MEYER, JUDGE. *Reversed and remanded with directions.*

Charles A. Fisher, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Richard H. Williams,* for defendant in error.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, WENKE, and BOSLAUGH, JJ.

WENKE, J.

This is an error proceeding from the district court for

Sioux County lodged in this court by Larry Anderson. Anderson was the defendant below and we shall so refer to him in this opinion. Defendant complains of the district court's order dismissing his appeal from the county court of Sioux County.

Defendant seems to have gotten into trouble in the village of Harrison in Sioux County on November 17, 1954. As a consequence thereof the sheriff of that county brought charges against him in the county court complaining that he was disturbing the peace; operating a motor vehicle while under the influence of alcoholic liquor; operating a motor vehicle upon the streets and highways in willful disregard for the safety of persons and property; and willfully resisting, abusing, and threatening the marshall of the village of Harrison. On November 19, 1954, defendant entered a plea of guilty to the first two and fourth of these charges and was sentenced thereon, the third being dismissed. Thereafter, on November 26, 1954, defendant sought to appeal from all three charges on which he had been sentenced, giving notice of appeal and providing a bond for that purpose.

In the county court the complaint of disturbing the peace was filed as case No. 542 and the complaints charging the other three offenses were filed as case No. 543.

On November 27, 1954, which was within 10 days of November 19, 1954, defendant filed with the county judge of Sioux County a notice of his intention to appeal to the district court for Sioux County together with a praecipe. The notice of appeal covered all three of the charges to which he had pleaded guilty and on which he had been sentenced. The praecipe requested the county judge to fix the amount of the appeal bond and to prepare a properly certified transcript for appeal to the district court containing the complaint, judgment, notice of appeal and praecipe, order fixing the amount of the appeal bond, and the appeal bond. The county

judge thereupon fixed the amount of an appeal bond at $500 which the defendant provided. The bond given to and accepted by the county judge covered all three offenses to which the defendant had pleaded guilty and on which he had been sentenced. The written bond was executed in the form provided by section 29-611, R. R. S. 1943, and met all the conditions therein specified. See, Benson v. State, 158 Neb. 168, 62 N. W. 2d 522, 42 A. L. R. 2d 991; McDonald v. State, 161 Neb. 118, 72 N. W. 2d 521. This was essential. See, Killian v. State, 114 Neb. 4, 205 N. W. 575; Thomsen v. State, 82 Neb. 634, 118 N. W. 330. As stated in Killian v. State, *supra:* "Section 1, ch. 113, Laws 1923, is mandatory in its terms and is but an amendment of section 9999, Comp. St. 1922 (now section 29-611, R. R. S. 1943), which has been frequently held by this court to be mandatory. In construing section 9999, this court has held that a defendant in a misdemeanor case, desiring to appeal from an inferior court to the district court, must substantially comply with the statute in order to give the latter court jurisdiction."

The county judge accepted and approved the bond given, which is all the statute requires. Thereupon, pursuant to the praecipe, the county judge prepared the transcript requested in both cases Nos. 542 and 543, being respectively cases Nos. 2193 and 2194 in the district court.

In case No. 543, which is the one with which we are here concerned, the county judge certified that he had compared the copies therein contained with the original thereof in this case, which remained in his court, and that they were correct copies thereof and a correct transcript of the whole of said original record. This was conclusive in the district court that the county judge had accepted the notice of appeal and bond in case No. 543, and approved the latter. We have always adhered to the rule that in appellate proceedings the record of the trial court, when properly prepared and verified,

imports absolute verity. See, Worley v. Shong, 35 Neb. 311, 53 N. W. 72; Sullivan v. Benedict, 36 Neb. 409, 54 N. W. 676; McDonald v. State, *supra.* As stated in Sullivan v. Benedict, *supra:* "The record of the county court, as embodied in a duly authenticated transcript, imports absolute verity and cannot be contradicted in the appellate court by extrinsic evidence." And, as held in In re Estate of Bednar, 151 Neb. 242, 37 N. W. 2d 195, and quoted with approval in McDonald v. State, *supra:* "Appellee introduced evidence in the district court to the effect that the date of April 20, 1948, as shown by the transcript, was not the correct date the order was made by the county court, but that it was made at a later date. Any evidence of this character was improper. It is a fundamental rule applicable to all appellate proceedings that the record of a court where a matter originated or was tried when properly authenticated imports absolute verity and cannot be contradicted, varied, or changed by oral testimony or any extrinsic evidence. An issue of fact cannot be made in this court as to any matter properly shown by the records of the court where the case originated or was tried from whence the case comes to this court for review."

Section 29-611, R. R. S. 1943, which provides the procedure whereby a defendant shall have the right of appeal to the district court of the county in such cases as here, which Article V, section 17, of our Constitution guarantees, requires, when a bond is given and approved, that: "The magistrate from whose judgment the appeal is taken shall forthwith make return of the proceedings had before him, and *shall certify the complaint* and the warrant *together with all such recognizances to the district court,* * * *." (Emphasis ours.) It will be noted that the duty to prepare and file the transcript is with the county judge after he has been notified of the intent to appeal and proper bond, conditioned as provided by this statute, has been given to,

accepted, and approved by him. That the transcript should contain the original complaint and recognizance is fully evidenced by sections 29-612 and 29-613, R. R. S. 1943. The first of these statutes requires that when the transcript and recognizance are turned over to the clerk of the district court it is his duty, as far as the recognizance is concerned, to file it and then record it in a book kept for that purpose; whereas, the second statute cited provides the district court shall hear and determine any case so appealed upon the original complaint.

As already indicated the transcript filed on December 3, 1954, in the clerk of the district court's office contained only copies of these instruments. Upon the State moving to quash the transcript and dismiss the appeal, the district court found there was no proper transcript on file and therefore ordered the county judge to transmit the original papers and transcript of what transpired in the county court.

That the district court had jurisdiction of the appeal and authority to make such order seems clear, for, as stated in Fulton v. Ryan, 33 Neb. 456, 50 N. W. 430: "Where a transcript of a judgment rendered in a justice court is filed by either party in the district court within thirty days from the date of the judgment, the appellate court will thereby acquire jurisdiction of the case, although the transcript is not full and complete."

In discussing this matter the court therein stated: "But suppose an imperfect one is filed in time, as was the first one in this case, would not the appellate court acquire jurisdiction to order a perfect transcript sent up? There can be no doubt of it. To our mind it appears illogical to say that the district court obtained jurisdiction for such purpose, but lost jurisdiction when the complete transcript was filed. That no order of the court was taken against the justice to send up a perfect transcript is quite immaterial. The same purpose was accomplished by its being voluntarily furnished.

When a transcript is filed in time, although incomplete, the appellate court acquires jurisdiction of the case."

Was the defendant estopped to file a correct transcript? As already set out it was the duty of the county judge, placed on him by the statute, to prepare the transcript and file it in the office of the clerk of the district court. In such instances the party appealing does not lose his rights because the judge either fails to perform his duty properly or out of time, provided the failure is not because of any act or fault of the party seeking to appeal or his counsel. None is here shown.

As stated in Drexel v. Reed, 65 Neb. 231, 91 N. W. 254: "Where a party has, within due time, done all that is legally required to perfect an appeal, and no waiver of transmission of records by county judge is shown, district court does not lose jurisdiction of appeal by reason of its being filed six days late."

And in Larson v. Wegner, 120 Neb. 449, 233 N. W. 253, we said: "We have held that, where the appellant has done all things necessary, he cannot be deprived of his appeal by the negligence or fault of the officers of the court whose duty it is to prepare the transcript."

We think the trial court was correct in ordering the county judge to do what he did. On June 13, 1955, the county judge sought to comply therewith but in this case his transcript did not contain a notice of appeal or bond. Thereupon the district court sustained the State's motion to quash and dismissed the appeal. It is from this order that the error proceeding was taken by the defendant after his motion for new trial had been overruled.

It becomes apparent that after the district court, on May 10, 1955, ordered the county judge to file the original papers with the transcript in each appeal that the latter had required only one written notice of appeal and one bond to be deposited with him covering all three charges on which defendant had been sentenced in cases Nos. 542 and 543. He thereupon filed the notice of ap-

peal and bond in case No. 542, thus having neither to transmit to the district court in No. 543. Since the notice of appeal and bond had been accepted and the bond approved by the county judge, to cover all of the charges, which is all that the statute requires, we do not think the fact that the county judge does not now have separate original instruments to place in each transcript should defeat defendant's right to appeal.

We think the district court should have given defendant a reasonable length of time to have prepared and executed a duplicate original bond to be deposited with the clerk of the district court in order to complete the transcript and to carry out what the county judge had not been able to do because he accepted one original written bond covering all three charges when he should have required two in order to be able to properly prepare two separate transcripts on appeal. As stated in Chase v. Omaha Loan & Trust Co., 56 Neb. 358, 76 N. W. 896: "The district court gave no opportunity to the appellant to give a new bond, but peremptorily dismissed the appeal. This was substantial error."

What has been said of the bond would also be applicable of the notice of appeal, although the statute does not require it to be in writing.

In view of what we have herein said we think the trial court was in error in dismissing the appeal. We therefore reverse its judgment in this respect and remand the cause with directions that it give defendant 30 days in which to deposit with the clerk of the district court a duplicate original of both the notice of appeal and bond. That if he does so, with the same sureties, within that time that the cause then stand for trial but if he fails to do so within that time that the appeal be dismissed.

REVERSED AND REMANDED WITH DIRECTIONS.

CHAPPELL, J., participating on briefs.

ROY A. BITLER. APPELLEE, V. TERRI LEE, INC., APPELLANT.
81 N. W. 2d 318

Filed March 1, 1957. No. 34013.

1. **Contracts: Evidence.** If the existence of a written contract has been induced by prior or contemporaneous oral agreement, parol evidence is not admissible to add to or contradict terms of the written contract.
2. ———: ———. If negotiations between parties result in an agreement in reference to the subject matter thereof and if they reduce their agreement to writing, execute, and deliver it, the writing, in the absence of fraud, mistake, or ambiguity, is the only competent evidence of the contract.
3. **Damages.** Damages which are uncertain, conjectural, or speculative as to the existence, nature, or proximate cause thereof are not the basis of a recovery.
4. **Contracts: Damages.** Plaintiff, in an action for damages because of breach of contract, must, to recover substantial damages, furnish data sufficient to permit the court to determine with reasonable certainty the amount of the damages.
5. ———: ———. Damages are recoverable for losses caused by breach of a contract only to the extent that the evidence affords a sufficient basis of ascertaining their amount in money with reasonable certainty.
6. **Damages.** If damages are susceptible of reasonably accurate computation, the amount may not be left to conjecture.
7. **Trial.** If it is clear that a verdict is excessive and there is no method by which the court can ascertain the extent of the excess, a remittitur may not be properly required since this would amount only to a substitution of the judgment of the court for that of the jury.

APPEAL from the district court for Lancaster County: JOHN L. POLK, JUDGE. *Reversed and remanded.*

Ginsburg, Rosenberg & Ginsburg, for appellant.

Clarence M. Pierson, Elmer M. Scheele, and *William D. Blue,* for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

BOSLAUGH, J.

This is an action on a written contract of employment

brought by appellee to recover damages from appellant for alleged wrongful termination of the contract and the discharge of appellee from his employment.

The circumstances of the first cause of action asserted by appellee are: Appellant is a domestic corporation authorized to manufacture and sell dolls and doll accessories. A contract was made by the parties on or about October 24, 1951, as of April 15, 1951, by which appellee was employed for a period of 3 years commencing April 16, 1951, to be the plant manager of the factory of appellant and to look after the production, manufacture, and shipping of products to be sold by it in its business. Appellee was obligated by the contract to loyally serve appellant, to keep all information obtained by him during the employment confidential, and to refrain from becoming associated with any competing business until 1 year from the date of the termination of his employment by appellant. A copy of the contract was made a part of the cause of action. The compensation of appellee was $150 per week; an annual bonus of $5,000 for each year if the sales of appellant were not less than its sales for the year immediately preceding the commencement of the contract and if the margin of gross profit of appellant on its sales was not less than the margin of gross profit received by it for the year immediately preceding the commencement of the contract; and an additional yearly bonus of 2 percent of gross profit on sales of appellant in excess of $500,000 per year if its sales were increased to that amount for any year during the employment of appellee and if the percentage of gross profit of appellant should not be less than the percentage of gross profit received by it on its sales the year next preceding the commencement of the contract. Appellee entered upon the performance of the duties of his employment April 16, 1951; faithfully and competently performed all things required of him to be done; and has been and is able, willing, and ready to fully perform the contract of employment according to its re-

quirements. The appellant on or about September 15, 1952, without cause, wrongfully terminated the employment of and discharged appellee. During the periods covered by the written contract to and including the year ending April 15, 1954, the contingencies and conditions precedent to appellee being entitled to a bonus of $5,000 for each of the periods of April 15, 1952, to April 15, 1953, and April 15, 1953, to April 15, 1954, and appellee being entitled to an additional yearly bonus of 2 percent on the amount of the gross sales of appellant in excess of $500,000 occurred and were satisfied but no part thereof has been paid to appellee. The weekly salary was paid to appellee according to the contract to September 15, 1952. The amount claimed due appellee on the first cause of action is stated.

The second cause of action of appellee is based on these claims: In March 1951 the parties made a separate and independent oral agreement that appellee would be paid expenses of traveling from Lincoln to Fair Lawn, New Jersey, where his family resided, and the expenses of transporting appellee, his family, and his household furnishings from Fair Lawn, New Jersey, to Lincoln. The agreement was made by appellant with appellee as an inducement of his execution of the written contract described in the first cause of action and the consideration for the oral agreement was the promise of appellee to enter into the written contract. Appellee relied on the oral agreement and incurred the expenses and costs contemplated by it, the amount of which is stated.

The third cause of action of the petition of appellee was dismissed in the trial court because of insufficient evidence. The judgment of dismissal has become final and no further mention of it will be made.

The answer of appellant to the first cause of action of appellee consists of the following: Admission of its corporate existence and capacity as claimed by appellee and that the exhibit attached to the petition is a copy of the written contract of the parties made under

date of October 24, 1951, a denial of all other matters asserted in the first cause of action, and affirmative defenses which will be detailed if required later herein. The answer of appellant to the second cause of action admitted its existence and corporate capacity as claimed by appellee and denied all other statements made therein. The reply of appellee was a denial of all new matter contained in the answer of appellant.

The trial of the case resulted in a general verdict for appellee and against appellant for the gross amount of $43,443.40. The motion of appellant for judgment notwithstanding the verdict or, in the alternative, for a new trial, was filed May 13, 1954. It was argued and submitted to the court and thereafter on January 31, 1956, the district court by order of that date set aside and vacated all of the verdict of the jury in excess of the sum of $9,398.60 and rendered judgment in favor of appellee and against appellant on the first cause of action in the sum of $8,462 and on the second cause of action the sum of $936.60, a total of $9,398.60 with interest thereon at 6 percent per annum from May 4, 1954.

Violet Gradwohl, referred to herein as Mrs. Gradwohl, was the president of appellant. She was in New York in March of 1951 in the interest of the corporation, displaying dolls at the annual toy fair. She had under consideration the employment of a production manager for the factory of appellant at Lincoln. She met appellee and they had a general conversation on March 20 or 21, 1951. He gave her a printed statement of his background in management planning and coordinating over-all plant production operation and of his experience and accomplishments as plant manager in two locations for considerable periods of time. Mrs. Gradwohl said that she was president of appellant and that she intended to employ a plant manager before she returned to Lincoln. She asked appellee to contact her the next day and they would continue their conversation. They met as she suggested. Appellee testified that she said she

was looking for a good man who was qualified in manufacturing and the over-all problem was discussed. She said she had a small factory and production in Lincoln; that she was not able to produce all of the orders she had for the 1950 Christmas business; that she had gross sales of $220,000 the previous year and she spoke of the margin or percentage of profit on the sales; that if he decided to accept employment by appellant, she would give him $150 per week, a $5,000 bonus each year for a 3-year period if he got the business up to $500,000, and an additional bonus on a gross profit set-up of 2 percent of the gross profit on the volume in excess of the first $500,000; that the gross profit was to be 50 percent of the gross business; that she would pay the expense of three round trips from New York to Lincoln and return and the moving expenses of appellee and his family from Fair Lawn, New Jersey, to Lincoln; that she would allow appellee a month's vacation with pay each year; and that when appellee came to Lincoln and started work for appellant she would have her attorney, Mr. Ginsburg, "draw up a written agreement concerning everything that we determined in her room in the Hotel New Yorker."

Appellee came to Lincoln, made the investigation he desired, accepted the offer he claims Mrs. Gradwohl made in New York, and on April 3, 1951, returned to his home in Fair Lawn, New Jersey. He said he was paid for the expense of that trip. He returned to Lincoln April 15, 1951, and commenced his employment by appellant April 16, 1951, in the capacity stated in the written contract.

The first draft of the written contract was prepared by Mr. Ginsburg. A copy of it was delivered to appellee and he had it for at least 3 days, consulted with his attorney in reference to it, and returned it to Mr. Ginsburg with suggestion for a change in it. The final draft of the contract, a copy of which is attached to the petition, was prepared by Mr. Ginsburg as appellee re-

quested. It was approved and executed by the parties to it. It bears date October 24, 1951, but was to be effective as of April 15, 1951, as recited therein. Appellee testified that the intention was to include in the written contract all of the terms of the agreement made by him with appellant and that the written contract does that. Appellee made no representation or claim to Mr. Ginsburg about appellant having agreed to pay appellee for travel or moving expenses when Mr. Ginsburg was receiving information and instruction concerning the terms and provisions of the contract preliminary to preparing it; neither did appellee mention that he claimed that there was such an agreement at the time he suggested to Mr. Ginsburg a change in the first draft of the written contract or at any other time. Appellee testified that he made no claim for moving expense of himself and his family to Lincoln before he filed this lawsuit October 22, 1952.

Mrs. Gradwohl testified that she made no agreement with appellee to pay him any travel expense or any expense of moving his family to Lincoln except she agreed to pay the expense of his trip to Lincoln to investigate concerning the proposed employment; that if he decided to enter the employ of appellant she would pay the plane fare back to New Jersey from Lincoln; and that she paid appellee exactly what she agreed in this respect.

The proof does not sustain the contention of appellee that the alleged oral agreement concerning the travel expense, the expense of transportation for his family, and the cost of transporting his household furnishings, as pleaded in the second cause of action, was a collateral oral contract separate and distinct from and independent of the written contract made by the parties; that the parol agreement was the inducement of appellee executing the written contract; and that the execution of it by him was the consideration for the oral agreement. The evidence is convincing that the negotiations had by the parties concerned the single matter of the employ-

ment of appellee by appellant and the offer made by appellant to appellee concerning it consisted of one conversation had in New York. The obligation of appellant to appellee if he accepted the offer and performed the duties it required was, as testified by appellee, enumerated in that conversation as a connected whole, namely, weekly salary, bonuses upon certain conditions, travel expenses incurred by appellee, and the cost of moving his family and household furnishings from New Jersey to Lincoln. It is true there is disagreement of the parties as to how much travel expense appellant was obligated to pay appellee and as to any liability of appellant to appellee for the expense of his moving his family and household furnishings but whatever was said concerning these was said in that one conversation which constituted the negotiations for the employment of appellee by appellant. Whatever was the offer there made was the subject matter concerned in and evidenced by the written contract subsequently made and acted upon by the parties. It was the understanding at the conclusion of the negotiations in New York that if appellee accepted the offer made him by Mrs. Gradwohl after he had made an investigation in Lincoln, everything comprehended in the offer would be made the subject of a written contract of the parties to be prepared by Mr. Ginsburg who was referred to as her attorney. The written contract was prepared in October of 1951 after appellee had discussed what it should contain with Mr. Ginsburg. A draft of the contract was given appellee. He had it for several days, consulted his attorney concerning it, and suggested a change in it which was made when the contract was finally written. Appellee at that time made no claim of the now-asserted oral agreement concerning travel and moving expense. He testified at the trial that it was the intention of the parties that the written contract should express and evidence the whole of the agreements of the parties and that the contract prepared and executed does that. He also testified that he made

no claim for moving expenses until he filed the lawsuit on October 22, 1952.

Appellee may not extract from negotiations resulting in his employment an understanding which he claims was arrived at by the parties concerning his travel and moving expense and frame a cause of action thereon independent from and in disregard of the written contract of the parties subsequently made which concerns the subject matter of the negotiations. The understanding of the parties resulting therefrom may not be thus fragmentized. Whatever was said by the parties concerning the travel and moving expense was, as shown by the testimony of appellee, a part of the conversation concerning and relating to his employment by appellant and any oral understanding by the parties concerning it should have been, and to be effective was required to be, included in the written contract. It is said in Hoerger v. City State Bank, 151 Neb. 321, 37 N. W. 2d 393: "Where negotiations take place between parties which result in their reaching an agreement in reference to the subject matter of the negotiations, and the parties reduce their agreement to writing, sign and deliver the same, such writing, in the absence of fraud, mistake, or ambiguity in the writing, constitutes the best and only competent evidence of the contract."

The following is contained in Annotation, 33 A. L. R. 2d 968: "All oral negotiations or stipulations between the parties, preceding or accompanying the execution of the written instrument, are regarded as merged in it, and the instrument is treated as the exclusive medium of ascertaining the agreement of the parties to it. * * * The reason for this rule is that it is only reasonable, where parties have entered into a written agreement, to suppose that they have introduced into the instrument every material term and circumstance; and, consequently, all parol testimony of conversations made by either of them, whether before or after, or at the time of, the completion of the contract, will be rejected. * * * With

respect to the first-mentioned theory (adding by parol evidence to the contract evidenced by writing), it has been well said that the rule forbids to add by parol where the writing is silent, as well as to vary where it speaks, that generally it will be presumed that the parties have introduced into the written contract every material item and term, and that parol evidence connot be admitted to add another term to the agreement, although the writing contains nothing on the particular feature to which the parol evidence is directed." See, also, Barkalow Bros. Co. v. English, 159 Neb. 407, 67 N. W. 2d 336; Ford v. Luria Steel & Trading Corp., 192 F. 2d 880; 20 Am. Jur., Evidence, § 1099, p. 958.

The second cause of action has not been brought within any exception to the general doctrine expressed in and sustained by the above authorities. The record does not sustain the second cause of action. The submission of it to the jury was erroneous and prejudicial. The recovery allowed appellee thereon cannot be sustained.

Appellee was employed by appellant as plant manager of its factory in Lincoln to superintend it and to look after the production, manufacture, and shipping of products sold by it in the conduct of its business. The service of appellee, because of the contract of employment with appellant, commenced April 16, 1951, and continued at the Lincoln factory until it was totally destroyed, except the records of appellant, December 15, 1951. The business of appellant was the manufacture of quality dolls, doll garments, and accessories consisting of stockings, shoes, and many other items that were appropriate for the many and various types of dolls that were made by appellant. The objective was to produce and market a doll that would look as nearly as possible like a real child and for which clothing and accessories were available and of such a nature that they could be put on the doll and changed by a child. This idea was developed by Mrs. Gradwohl commencing in 1946. Appellant

was incorporated in 1948 and it thereafter conducted the business as a quality production until its factory was destroyed by fire in December of 1951. In January 1952 appellant secured and equipped a small plant in Lincoln in which it resumed the making of doll garments and clothing. It did not have space or capacity for any other department of the normal activity of the appellant.

A site for a factory and a building thereon were purchased by Mrs. Gradwohl in Apple Valley, California, about the first of March 1952, and she then made arrangements to have the building put in proper condition for and equipped as a plant in which the business formerly conducted in Lincoln could be pursued. Production of dolls was commenced at the California plant about May 10, 1952. There were some dolls ready for shipment about May 15, 1952. The first shipment of dolls was made from there about May 26, 1952. The plant commenced operations with 6 or 7 employees. The number was soon increased to about 20 but they were new employees with substantially no experience or training for the work to be done. Many problems developed that made any production almost impossible. The situation did improve and about the middle of June 1952 the number of employees had increased to about one-third as many as were employed at the time of the fire in December 1951 but at that time other difficulties arose. Production slowed down, employees were laid off, and production substantially ceased. There was a delay then until July 5 or 6, 1952. Appellee was from about May 10, 1952, to July 10, 1952, production manager of the plant at Apple Valley, California. A new production man was placed in charge of the plant on July 10, 1952. Appellee was made receiving and shipping clerk and was permitted to interview applicants for employment but the new manager decided if the applicant should be employed and if engaged where he would work. Appellee continued in this capacity until September 15, 1952, on which date his services were discontinued and he then

left and did not return to the plant. He thereafter had no connection with or knowledge of the business. The business conducted in California commencing in May 1952 referred to above was by a partnership consisting of Violet Gradwohl and Grace Hast, the name of which is Terri Lee of California.

Appellee, prior to his employment by appellant, was for 3 years plant superintendent of a company in New Jersey that manufactured a general line of toys and games. He was also employed by a company and became and was for several years manager of its Long Island City, New York, factory. This company also made toys and games. The character and scope of the specific duties performed by him in these two engagements are not mentioned in the record. It is not shown that appellee had any instruction or training in cost accounting. He had not before the employment concerned in this case had any experience in the making and disposing of articles of the kind and character of those produced and sold by appellant. The materials and supplies required by appellant in the conduct of its business were purchased by Mrs. Gradwohl or by her immediate direction. She decided what appellant would obligate itself for in this regard, she determined what appellant should receive for any item it sold, and she controlled the labor employed and the compensation paid. Appellee fixed no prices, made no sales, and produced no customer. These were matters in the exclusive province of Mrs. Gradwohl. In short, the policies, practices, and activities of appellant were determined by her and her decisions and directions were final. The obligation of appellee in reference to these was only to perform her directions and decisions insofar as they operated in his sphere of employment. The knowledge appellee had of the business operations of appellant as a manufacturing concern was limited to the contact he had with them during the brief periods of April 16, 1951, to December 15, 1951, and from May 10, 1952, until September

15, 1952, under the circumstances recited above.

The contract of the parties was that appellant employed appellee for a period of 3 years commencing April 16, 1951, as plant manager of the factory of appellant in Lincoln, Nebraska; that appellee agreed to serve appellant as such plant manager, devote his time and best efforts to the superintendence of the factory, and look after the production, manufacture, and shipping of products sold by appellant in its business to its best advantage and interest; and that the compensation to be paid appellee by appellant was $150 per week, an annual bonus of $5,000 if its sales and the margin of gross profit were not less than during the year preceding the going into effect of the contract, and, if its sales were increased to $500,000 per annum, appellee should receive from appellant an additional bonus of 2 percent of the gross profit of appellant on sales over $500,000 if its percentage of gross profit was not less than its percentage of the gross profits received on its sales for the year preceding the commencement of employment of appellee as evidenced by the contract. Appellee was paid the weekly salary to September 15, 1952, as required by the contract. He was paid $5,000 referred to by him as his first-year bonus in this manner: Two-fifths thereof October 15, 1951; "The second part of my bonus was paid to me on December 15, 1951, and then the last of the bonus was paid early the following year" (1952). The $5,000 was obviously not paid after or because of a determination of the amount of the sales and the margin of gross profit the first year of the employment of appellee because appellant operated on a fiscal-year basis ending March 31 of each calendar year of which appellee was advised and in which he concurred. The contract conditions made it impossible to determine, when the three installments were paid appellee aggregating $5,000, that an annual bonus of $5,000, or any bonus, was or would be due appellee. These things could not be ascertained until after March 31, 1952. There has been

no amount paid appellee by appellant because of the contract in addition to the weekly salary and the $5,000 discussed above.

The contract made it necessary to determine by some method the amount of the sales of appellant during its fiscal year ending March 31, 1951, and its margin of gross profit for that period; likewise the gross sales and margin of gross profit for each fiscal year thereafter had to be determined. This was discussed by the parties when the matter of a bonus to appellee was considered and specified. Mrs. Gradwohl advised appellee that appellant had an accountant, Dana F. Cole, and that he supervised the books of appellant. Nothing was said concerning any change in the bookkeeping set-up of appellant or the manner of computation of gross profit. The books were to be continued to be kept by Dana F. Cole just as they had been in the past. The percentage of margin was a matter of bookkeeping and appellee understood that the percentage of margin of profit realized by appellant would be determined by Dana F. Cole on a fiscal-year basis.

Dana F. Cole set up the bookkeeping system for appellant when it was incorporated in 1948, has since had supervisory charge of the books, and has made computations and determined the gross margin realized by appellant from its business. There has been no change in his procedure in this regard. He has been a public accountant in Lincoln for about 37 years; maintains a place of business in the Stuart Building in Lincoln; has a staff of from 12 to 18 persons in his employ; does public accounting consisting of auditing and setting up books; advises on all types of management problems, cost accounting, and supervision of cost accounting; determines gross margins of profit on sales; and does income tax work. He is professor of accounting at the University of Nebraska. He has taught accounting and tax work at the University since 1915 except as he was interrupted by military service. He has written and had published

several books referred to as accounting and laboratory manuals. He is and has been accountant and auditor for appellant since its inception. His services for it have included designing the accounting plans, preparing and making interim and annual reports, preparing tax returns, making regular accounting audits prepared for annual statement purposes and for tax purposes, and aided in the organization and reorganization of companies. He has been and is familiar with the books of the company, the items that go into the sales made by it, the items that enter into the cost of the manufacturing done by the company, and the items constituting the gross margin resulting from its operations.

There were organized during the period commencing in May 1952 until September 30, 1953, by Mrs. Gradwohl and others, a partnership and five corporations. Mrs. Gradwohl was a member of the partnership and was president of each of the corporations. This was done for business reasons not important to be here reviewed and detailed. It is sufficient for this case that it was stipulated that for the purposes of this action appellee was permitted to consolidate the sales of these organizations, the sales of appellant, and all the gross profit thereof for each applicable year. Dana F. Cole has been the accountant for the partnership and the five corporations mentioned since the organization of each of them.

Appellee, by cross-examination of Dana F. Cole, introduced information which he had secured from the books of appellant as follows:

The gross sales of Terri Lee Doll Factory for the fiscal year ending June 30, 1953, were $26,528.09. The cost of producing the goods sold was $14,843.11. The margin of gross profit was 44.05 percent. The gross sales of this company from July 1, 1953, to March 31, 1954, were $39,800.93. The cost of producing the goods sold was $18,488.89. The percentage or margin of gross profit was 53.55 percent.

The gross sales of Ray Sheen Wig Corporation for the

fiscal year ending August 31, 1953, were $82,940.20. The cost of the goods sold was $52,688.42. The margin of gross profit was 36.47 percent. The gross sales of this company from September 1, 1953, to March 31, 1954, were $42,418.80. The cost of the goods sold was $30,-057.71. The margin of gross profit was 29.14 percent.

The gross sales of Connie Lynn Manufacturing Corporation for the fiscal year ending September 30, 1953, was $193,893.17. The cost of the goods sold was $139,-749.15. The margin of gross profit was 27.92 percent. Gross sales of this corporation for the period of October 1, 1953, to March 31, 1954, were $75,548.09. The cost of the goods sold was $63,080.45. The margin of gross profit was 16.50 percent.

The gross sales of Terri Lee Sales Corporation for the period ending March 31, 1954, were $1,301,587.91. The cost of the goods sold was $1,033,099.53. The margin of gross profit was 20.63 percent.

The gross sales of Terri Lee Fashions for the period ending March 31, 1954, were $259,455.60. The cost of the goods sold was $175,758.02. The margin of gross profit was 32.25 percent.

The gross sales of Terri Lee of California, a partnership, for the fiscal year ending April 30, 1953, were $696,-290.05. The cost of the goods sold was $460,067.99. The margin of gross profit was 33.93 percent. The gross sales of this company from May 1, 1953, to March 31, 1954, were $527,189.07. The cost of the goods sold was $442,-947.46. The margin of gross profit was 15.98 percent.

Appellee also adopted and introduced in the record the determination of the accountant made from the books of appellant that the sales of Terri Lee, Inc., the appellant, for the fiscal year ending March 31, 1951, were $223,097 and its sales for the fiscal year ending March 31, 1952, were $557,504.56. Appellee did not place in the record the cost of the production of the goods sold by appellant during either of these periods

as determined by the accountant from the books of appellant.

The accountant testified in detail concerning the cost of producing the goods sold by appellant during these periods as evidenced by and determined from its books. He said: The sales of appellant for the fiscal year ending March 31, 1951, were $223,097.34. The cost of the goods sold was $133,817.07. The gross margin was $89,280.27. The percentage of gross profit was 40.02 percent. He arrived at the cost of the goods sold in this manner: He added the beginning inventory, $16,570.03; the purchases, $81,096.05; and freight, $3,318.80. From the total of these, $100,984.88, he subtracted the ending inventory, $31,676.06, resulting in a balance of $69,308.82, to which he added labor expense of $44,696.53 for a total of $114,005.35. He added to the last amount depreciation on machinery and equipment, $2,693.46; packing and handling, $6,630.95; factory supplies, expenses, and direct supplies used in factory for repair, $5,044.01; and royalties, $5,443.30, or $19,811.72, and arrived at the sum of $133,817.07 as the cost of producing the goods sold during the fiscal year ending March 31, 1951. The sales of appellant for the fiscal year ending March 31, 1952, were $557,504.56. The cost of the goods sold was $412,443.56. The gross margin was $145,061 and the percentage of the margin was 26.02 percent. The accountant analyzed the precedure and method of arriving at the cost of the goods sold during this period as he did for the fiscal year ending March 31, 1951, and detailed above. This procedure and method were consistent and identical with the accounting procedure and method used by the accountant in the work done for appellant through the years of its existence and for the other companies referred to above since their organization. The same method and procedure were used by the accountant in arriving at the matters concerning which he testified in this case. The figures and amounts given by the accountant were the ones used and

included in the annual income tax returns made by the companies.

There was a recovery in 1952 of insurance by appellant on account of the loss of its factory by fire December 15, 1951, and the propriety of including any part of it in the consideration of the margin or percentage of gross profits is disputed. It is not important to resolve this problem because if the proportionate part of the insurance money received which might be allocated to the gross margin of that year is added to it, the total would be $213,831.98 instead of $145,061 as determined by the accountant and the total percentage would thereby be increased to 34.14 percent instead of 26.02 percent.

The accountant testified that the sales of appellant for the fiscal year ending March 31, 1953, were $426,772.04, the cost of the goods sold was $332,187.87, the gross margin was $94,584.17, and the percentage was 22.16 percent. If the proportionate part of the insurance money received by appellant which might be allocated to the gross margin for the fiscal year ending March 31, 1953, as the accountant testified, is added to it, the total gross margin would be $126,472.09 instead of $94,584.17 and the percentage would thereby be increased to 27.57 instead of 22.16 percent.

The accountant consolidated the figures he had given of actual sales and actual gross margins of all the companies that had fiscal years ending in 1953 and thereby he found that the sales of the group amounted to $1,426,423.55, that the gross margin was $426,897.01, and the percentage of margin was 29.93 percent. He made another consolidation of the total amount of all sales and the total of all gross margins he had given in his testimony for the entire period involved and this shows total sales of $2,522,080.45, a total gross margin of $534,039.47, and a percentage margin of 21.17 percent.

Appellee relies almost exclusively on his testimony as evidentiary basis for his conclusion that the conditions of the contract of employment have been complied with

and that he is entitled to each of the bonuses specified in the contract. His testimony, insofar as it was intended to establish cost of production, margin of gross profit, and percentage of gross profit, is unsupported by any record, data, or corroboration. The facts elicited by appellee by cross-examination of Dana F. Cole, the accountant, on these subjects are contradictory of the testimony and contention of appellee. He boldly and positively asserts that he kept a record of the cost of goods sold and the sales. He did not exhibit or attempt to place in evidence such a record during the trial of the case. He was asked at the trial if he kept records of any kind of the production during the period between April 16 (1951) and December 15 (1951). His answer was: "I kept my own record in my wallet of the amount of business we shipped each day, and each day, if we would ship $6,000.00, I'd add it to the previous total for that particular month." This is the only mention in the record of this case that has been found of any claim that appellee made a record of any kind concerning any part of the business of appellant while he was employed by it. The evidence of appellee just quoted makes no mention of any record made or kept by him "of the cost of goods sold." He did not produce or offer any record or other data from which the "cost of goods sold," the margin of gross profit, or the percentage of margin of gross profit could be determined except the information given by the accountant referred to above.

The determination of the cost of production of manufactured goods, the gross margin, and the percentage of gross profit of the organization concerned would generally and logically be expected to be done from the books in which were recorded the facts of its day-to-day transactions and activities and according to usual and ordinary accounting practices. The record in this case shows quite clearly a definite understanding and contemplation of the parties to the contract that such a procedure should obtain in this instance. This is even recog-

nized by appellee. In the consideration of the contemplated employment of him by appellant the facts were discussed that it had an accountant; that he had set up the bookkeeping system used by appellant; that he had supervised and surveyed the books of appellant from time to time; that he had done all of the accounting and auditing work for appellant; that he prepared all its financial statements, reports, and tax returns; and that he had made computations of its gross margin of profit and the percentage thereof. It was understood that the books of appellant would continue to be kept by the accountant as in the past, that the matter of determining the percentage of margin of profit of appellant was a matter of bookkeeping, and that appellee understood that it would be done in the future by Dana F. Cole, the accountant, as he had done it in the past. It is convincingly certain in this case that the parties did not contemplate that such matters as gross sales, gross margins of profit, or the percentage thereof of appellant should or could be decided on information and data less definite, certain, and satisfactory than the information and evidence contained in its books kept in the ordinary course of its business. The law requires the best evidence available. A claimant of substantial damages must, to prevail, furnish appropriate data to enable the trier of fact to find the amount of damages with reasonable certainty and exactness if the evidence of damages or the amount thereof are susceptible of definite proof. They may not be established by conjecture, speculation, or doubtful proof.

The record of the financial operations of appellant was available in its books. Appellee examined the accountant of appellant very extensively as to information he had secured from the books. All the definite amounts of sales of goods by appellant put in the record by appellee were precisely the amounts the accountant disclosed in his testimony were recorded in and evidenced by the books of appellant on that subject but appellee

elected to attempt to evade the additional information contained in the books of appellant and testified to by the accountant directed to the cost of the production of the goods sold, the margin of gross profit, and the percentage thereof. No objection has been made and no issue raised that the books and records of appellant presented at the trial through the accountant were not fair, accurate, complete, or a correct representation of the activities of appellant. The data furnished from the books, the integrity of which has not been challenged, cannot be overcome by conclusions, speculations, projections, or theorizing such as appellee has offered in this case. The matter of sale of goods by appellant, cost of producing the goods sold, the margin of gross profit, and the percentage of gross profit are matters that admit of reasonably exact calculation under the circumstances of this case.

Reference is made by appellee to the fact that he contends that the additional bonus of 2 percent was based on gross profits of appellant being figured at 50 percent of the gross sales. This basis is employed in this respect in his computations in this case. Proof of this contention does not appear in the record except in the unsupported statement of a conclusion by appellee. There is no evidence that it was a representation or obligation as to what the gross profit had been in the past or would be in the future. Appellee says the "margin of profit or percentage was 50% or less" for the fiscal year ending March 31, 1951. This is the character of uncertainty, speculation, and statements of conclusions upon which appellee rests his case. The uncontradicted evidence of the record is that the percentage of gross profit of appellant for the fiscal year ending March 31, 1951, was 40.02 percent. This was established by its books. The purpose and attempt of appellee, without any knowledge of the facts, are to make it appear that the percentage of gross profit for that year was 50 percent. The statement of Mrs. Gradwohl made before

the end of that fiscal year does not clash with the fact that the actual percentage of gross profit was 40.02 percent. Appellee testified only that "she estimated the gross profit to be 50%" for the year ending March 31, 1951.

The testimony of appellee, in an attempt to establish compliance with conditions precedent of the contract of employment relative to the matter of bonus, was pointed to gross mark-up for an individual doll. It did not purport to cover gross margin on sales. The two are entirely different things. Gross margin on sales of manufactured goods must include overhead and selling expense of the year's operation. Appellee was asked what was the average profit on dolls and his answer was: "The gross profit *on a doll* was *at least* 50%." (Emphasis supplied.) Likewise, when he was asked how he computed gross margin of profit on sales, he said it is the cost of goods sold deducted from the gross sales but when the inquiry was made as to how he arrived at the cost of the goods sold he replied: "The cost of the goods sold includes the cost of the item, *cost of material,* and *cost of the labor.*" (Emphasis supplied.) The method attempted by appellee violated recognized accounting procedure. The accountant testified that it is improper to consider each article by itself in ascertaining gross margin and that it requires a consideration of the overall picture as between total sales and the arrived-at cost of the goods sold in order to determine gross margin. It is the actual result sustained during a period of time, usually the fiscal year of the company.

Appellant had business interruption insurance when its factory was destroyed December 15, 1951. There was evidence that an adjustment of this was made on the basis of the payment of $73,000 to appellant. Appellee was asked if he could calculate the amount of gross profit that $73,000 received from the business interruption insurance would represent. He was permitted, over comprehensive and proper objections, to testify that the

figure was $300,000. He was allowed to testify that based on $300,000 worth of production that would have occurred in the balance of December, January, February, and March, the fiscal year ending March 31, 1952, the gross profits would be 50 percent of the gross sales or $150,000 and that 2 percent of that is $3,000 which is his bonus based on his agreement of 2 percent of the balance over and above the $500,000 figure. It hardly requires argument or authority to conclude that this was without foundation, was speculative, a conclusion, inadmissible, and prejudicial.

An inquiry was made of appellee if he could give the jury a picture of the production record of the company in California as of September 15, 1952. He answered by saying he would have to estimate; that he could not give an exact picture. He later said, presumably as an estimate but not as a fact that he knew, that 35,000 dolls were produced in California at the Apple Valley plant from May 15, 1952, to September 15, 1952, and this number at $8 a doll would be $280,000. He was asked what appellant charged for a doll and he said dolls ranged from $6 to $295. When asked what the gross profit on the dolls was he said it exceeded 50 percent. This evidence had no probative value as to what the sales were, what the cost of production of the goods was, or what the margin of gross profit or the percentage of gross profit was. Appellee discontinued his employment by appellant on September 15, 1952, and left its place of business. He did not return thereafter and had no contact with or knowledge of the affairs or activities of appellant. The only evidence of its operations thereafter is the testimony of the accountant and it in no way sustains any claim of appellee.

The proof of damages because of breach of a contract must be made with a reasonable degree of certainty. The damages, to be recoverable in such a case, must not be remote or speculative. There must be sufficient data produced by the claimant to permit a determination with

reasonable certainty of the loss occasioned by the breach relied upon.

In Harper v. Young, 139 Neb. 624, 298 N. W. 342, it is said: "The rule is that damages which are uncertain, contingent, conjectural, or speculative, cannot be made the basis of a recovery, whether applied to the existence, nature, or proximate cause thereof. 17 C. J. 753; 15 Am. Jur. 409, sec. 19; Williams v. Hines, 109 Neb. 11, 189 N. W. 623."

It is stated in Gallagher v. Vogel, 157 Neb. 670, 61 N. W. 2d 245: "In such an action, the plaintiff will be called upon, in order to recover substantial damages, to furnish such data to enable the court, with a reasonable degree of certainty and exactness, to estimate the actual damages, and if he fails to do this he can recover only a nominal sum."

Restatement, Contracts, § 331, p. 515, states the rule: "Damages are recoverable for losses caused or for profits and other gains prevented by the breach only to the extent that the evidence affords a sufficient basis for estimating their amount in money with reasonable certainty."

It is declared in Paxton & Gallagher v. Vadbonker, 1 Neb. (Unoff.) 776, 96 N. W. 378: "Where damages are susceptible of actual computation, the amount thereof should not be left to conjecture." See, also, Ricenbaw v. Kraus, 157 Neb. 723, 61 N. W. 2d 350; Snyder v. Platte Valley Public Power & Irr. Dist., 144 Neb. 308, 13 N. W. 2d 160, 160 A. L. R. 1154; O'Shea v. North American Hotel Co., 109 Neb. 317, 191 N. W. 321; 15 Am. Jur., Damages, § 20, p. 410; 25 C. J. S., Damages, § 28, p. 496. The evidence is insufficient to sustain a finding of compliance with the conditions precedent of the contract of employment relative to bonuses or to sustain recovery by appellee for any amount of bonus mentioned in the contract.

Appellee claimed recovery of damages on his first cause of action as follows: $12,350 for weekly salary

from September 15, 1952, and interest thereon at legal rate; $10,000 for annual bonus for 2 years as provided in paragraph 2 of the contract and interest thereon at legal rate; $33,245.02 additional bonus as provided in paragraph 3 of the contract and interest on $3,760 of that amount at legal rate. Appellee claimed recovery on his second cause of action of $936.60. The verdict of the jury was for appellee in the gross amount of $43,-443.40. The district court denied the motion of appellant for judgment notwithstanding the verdict or, in the alternative, for a new trial; vacated all of the verdict except $9,398.60, consisting of $8,462 on the first cause of action and $936.60 on the second cause of action; and entered judgment for appellee in the sum of $9,398.60 with interest from May 4, 1954, at legal rate. It is impossible to determine from the record the amount the jury allowed recovery on any of the items of the first cause of action or how much, if any, it allowed on the second cause of action. The action of the trial court was incorrect. The motion of appellant for a new trial should have been sustained.

The doctrine in this state in this regard is stated in Peacock v. J. L. Brandeis & Sons, 157 Neb. 514, 60 N. W. 2d 643: "Where it is clear that a verdict is excessive but there is no method by which the court can rationally ascertain the extent of the excess, a remittitur cannot be properly required since a remittitur would amount only to a substitution of the judgment of the court for that of the jury."

The cross-appeal of appellee should be and it is denied. The judgment should be and it is reversed and the cause is remanded to the district court of Lancaster County for further proceedings according to law.

REVERSED AND REMANDED.

MRS. HARRY MASKA, ALSO KNOWN AS PHYLLIS MASKA, APPELLEE, V. CLYDE C. STOLL, APPELLANT.

81 N. W. 2d 571

Filed March 1, 1957. No. 34072.

1. **New Trial: Appeal and Error.** If the trial court gave no reasons for its decision in sustaining the motion for new trial, then the appellant meets the duty placed upon him when he brings the record here with his assignments of error and submits the record to critical examination with the contention that there was no prejudicial error. The duty then rests upon the appellee to point out the prejudicial error that he contends exists in the record and which he contends justifies the decision of the trial court. The appellant then in reply has the right, if he desires, of meeting those contentions.
2. **Trial.** In determining the sufficiency of the evidence to sustain a verdict, the evidence must be considered most favorably to the successful party, any controverted fact must be resolved in his favor, and he must have the benefit of the inferences reasonably deducible from the evidence.
3. **Automobiles: Highways.** When a person enters an intersection of two streets or highways he is obligated to look for approaching cars and to see those within that radius which denotes the limit of danger. If he fails to see a car which is favored over him under the rules of the road, he is guilty of contributory negligence sufficient to bar a recovery as a matter of law. If he fails to see an automobile not shown to be in a favored position, the presumption is that its driver will respect his right-of-way and the question of his contributory negligence in proceeding to cross the intersection is a jury question.
4. ———: ———. Where two motorists approach an intersection at or about the same time, the driver approaching from the right at a lawful speed has the right-of-way, and he may ordinarily proceed to cross, having a legal right to assume that his right-of-way will be respected by the other party, but if the situation is such as to indicate to the mind of an ordinarily careful and prudent person in his position that to proceed would probably result in a collision, then he should exercise ordinary care to prevent an accident, even to the extent of waiving his right-of-way.
5. **Automobiles.** The lawfulness of the speed of a motor vehicle within the prima facie limits fixed is determined by the further test of whether the speed was greater than was reasonable and prudent under the conditions then existing.
6. **Negligence: Trial.** Where different minds may draw different

conclusions from the evidence in regard to negligence, the question should be submitted to the jury.

7. **Trial.** It is the duty of the trial court, without request, to instruct the jury on each issue presented by the pleadings and supported by evidence. A litigant is entitled to have the jury instructed as to his theory of the case as shown by pleadings and evidence, and a failure to do so is prejudicial.

8. **Statutes: Municipal Corporations.** When a statute or a city ordinance is ambiguous or susceptible of two constructions, one of which creates absurdities, unreasonableness, or unequal operation and the other of which avoids such a result, the latter should be adopted.

APPEAL from the district court for Douglas County: WILLIAM A. DAY, JUDGE. *Affirmed.*

Fraser, Crofoot, Wenstrand, Stryker & Marshall, Robert G. Fraser, and *Albert C. Walsh,* for appellant.

Matthews, Kelley & Delehant and *Martin A. Cannon,* for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, WENKE, and BOSLAUGH, JJ.

MESSMORE, J.

This is an action for damages brought in the district court for Douglas County by Mrs. Harry Maska, sometimes known as Phyllis Maska, plaintiff and appellee, for injuries sustained by her when she was riding as a guest in an automobile being driven by her husband which collided with an automobile being driven by Clyde C. Stoll, defendant and appellant. The case was tried to a jury, resulting in a verdict for the defendant. The plaintiff filed a motion for new trial which was sustained. From the order sustaining the motion for new trial, the defendant appealed.

The plaintiff's amended petition charged the defendant with negligence as follows: In failing to keep a proper lookout for other vehicles upon the road, and particularly the vehicle being driven by the plaintiff's husband; in failing to keep his automobile under proper control

and to make use of the instrumentalities at hand to do so; in failing to yield the right-of-way to the automobile being driven by the plaintiff's husband; in driving at an unlawful and excessive rate of speed in view of the circumstances at said time, to wit: 35 miles an hour; and in failing to apply his brakes or do any other thing to avoid a collision.

The defendant's answer admitted that an accident happened and denied any negligence on his part. It further alleged that the sole and proximate cause of the collision was the gross negligence and want of care on the part of the driver and owner of the automobile in which the plaintiff was a passenger; and that if the plaintiff sustained any resultant damages or injuries, it was through no fault or negligence on the part of the defendant.

The accident occurred on Saturday, June 12, 1954, at or about 1:30 or 1:35 p.m., in the intersection of Hickory and Twenty-ninth Streets in Omaha. Hickory Street runs east and west and is paved with brick east of Twenty-ninth Street which runs north and south and is paved with asphalt. Hickory Street is about 24 feet wide east of Twenty-ninth Street and about 42 feet wide west of Twenty-ninth Street, and runs up a fairly steep grade to its intersection with Twenty-ninth Street. West of Twenty-ninth Street, Hickory Street is not quite as steep. Twenty-ninth Street is practically level, being slightly down grade to the south. The intersection of the two streets is level. At the time of the accident the weather was clear, the sun was shining, and the streets were dry.

For convenience we will refer to the plaintiff's driver as Maska and to his car as the Maska car; to the plaintiff as Phyllis; and to the defendant as Stoll and to his car as the Stoll car.

Maska testified that on June 12, 1954, he and his wife Phyllis and their small son were going to South Omaha. Maska was driving his 1952 Buick. His wife

sat to his right and their son stood up between them. Maska was driving south on Twenty-ninth Street which intersects with Hickory Street in a residential district. There was a slight down grade to the south on Twenty-ninth Street. Hickory Street crosses Twenty-ninth Street at right angles. The grade on Hickory Street to the east and west is fairly steep. It comes up from the east into the intersection and then goes up to the west. There is a "slow" sign facing north on Twenty-ninth Street. As Maska drove south on Twenty-ninth Street, his speed was 20 miles an hour, and he slowed down some as he approached the intersection. He noticed a car going east on Hickory Street, which was to the west of the intersection. This car parked half-way up the block, and Maska kept on going. He thought he could see almost to the next intersection west, but could not see too far to the east for the reason that it was down grade. He looked to the east, and as he approached the intersection there was nothing visible to him from the east. After he had entered the intersection, he saw Stoll's car about on the crosswalk on Hickory Street. Stoll's car was somewhere in the crosswalk that parallels Twenty-ninth Street on the east side of the intersection. Maska also testified that he did not have much time to do anything. Stoll's car was close enough that Maska knew he was going to be hit by it. He put his arm up in front of his son to hold him back, stepped on the brake, and there was a collision between his car and Stoll's car. The right front fender of the Stoll car struck the Maska car on the side, moved it a short distance, and it stopped in the intersection. Stoll's car glanced off the Maska car and proceeded east, then turned south on Twenty-ninth Street and struck a car that was parked up against the crosswalk that goes across Twenty-ninth Street on the south side of the intersection where it stopped. After the impact the Maska car had moved between 5 and 10 feet. Neither car left any skid marks. Maska talked to Stoll after the

accident, and believed that Stoll told him that he saw Maska, but it was too late to avoid an accident. Phyllis got out of the car. She was injured, and was helped by persons residing in the immediate vicinity. Maska further testified that at the northeast corner of the intersection there was a hedge, 4 feet or a little higher, on the inside of the sidewalk. Hickory Street to the east of the intersection is considerably narrower than Twenty-ninth Street. Stoll did not reduce his speed at any time. Stoll's right front fender struck back of the left front wheel of the Maska car. The frame of the Maska car was bent just back of the front wheel. The steering assembly and knee action on the car were damaged, and the back fender was dented. Maska believed that the Stoll car had hit the front of his car and the back end of the Stoll car swerved against the back end of the Maska car. The hood of the Maska car flew off and lit upon the sidewalk. The Maska car was not driveable, and was towed away.

On cross-examination Maska testified that he lived on Park Avenue, the next street west of Twenty-ninth Street. He had been in Omaha for about 2 months. He had been over Twenty-ninth Street a few times and was rather familiar with it. There was not much traffic as he approached the intersection. When he was about 30 feet north of the crosswalk, he glanced to the right and saw a car pull up to the curb and stop. In a deposition taken before trial he testified that he was not sure he applied his brakes, that everything happened suddenly. He heard no sound of brakes being applied or of a horn or other signal. He did not honk his horn. He remembered telling the police that he was going 20 to 25 miles an hour, and was going the same speed at the time of the collision. He believed he told Stoll that he did not see him until just a short time before the accident. It was just a "fleeting moment" until Stoll's car hit his car after he saw the Stoll car.

Stoll testified that he lived in Nebraska City, and on

June 12, 1954, he drove his 1946 model Ford club coupé to Council Bluffs to visit his wife's aunt and uncle, Mr. and Mrs. Joseph Childers. They decided to go to the races in Omaha, leaving Council Bluffs a few minutes before 1 p.m. Mrs. Childers sat to Stoll's right in the front seat, and Mr. Childers on the right side in the back seat. Stoll was not familiar with Twenty-ninth Street or Hickory Street. He had never been to the races in Omaha, and Mr. Childers was directing the route for him to travel to avoid heavy traffic. Stoll was traveling between 15 and 20 miles an hour in high gear. As he came up the hill on Hickory Street there were no cars parked, and traffic was light. There were no traffic control signals governing westbound traffic on Hickory Street. He was in his own right lane of traffic. There were three cars parked parallel to the curb on the east side of Twenty-ninth Street north of the intersection, and two cars parked on the west side of Twenty-ninth Street south of the intersection. Hickory Street widens out through the intersection at which point it is 42 feet wide, as is Twenty-ninth Street. Twenty-ninth Street, as it intersects with Hickory Street, is practically level. Stoll further testified that as he was traveling up Hickory Street and approached the intersection, he could see a little bit of the northeast corner of the intersection where there is a hedge. As he pulled out into the intersection, he gave a signal to make a left turn. He was driving 15 to 20 miles an hour, maintaining a constant speed. He observed no northbound traffic coming toward him. Prior to making the turn, Stoll looked to the north. He saw Maska's car just before the accident. At that time the cars were almost together. Stoll swerved his car and applied his brakes. After the accident Stoll's car traveled 10 or 12 feet and struck the bumper of a parked car. He got out of his car to see if anybody was hurt. He told Maska he did not see him, and Maska told Stoll that he did not see Stoll. There was a "slow" sign at the south-

east corner of the intersection governing northbound traffic.

On cross-examination Stoll testified that he was in the process of making a left turn when the accident happened. He sustained damage to the right front fender and to the side of his car. The right front headlight was broken. Part of the front bumper on the right side was damaged. The fender went through the radiator and knocked it back against the fan. He testified that while coming up that narrow street he could see there were bushes that blocked his view to the right, and also parked cars which blocked his view. He could see, when he got to the sidewalk. He did not slow down as he came into the intersection, and did not see the Maska car until just a "split second" before the accident. The accident was practically over when he saw the Maska car, and Stoll's car stopped about where the accident took place.

Mrs. Childers testified that she was familiar with some of the streets in Omaha; that there were no cars parked on either the north or south side of Hickory Street; that she was more or less directing Stoll's route to the races; and that she was watching because she was not too familiar with the streets. She looked to the north and south on Twenty-ninth Street to see if there was any traffic before entering the intersection. She could see about one-third of a block to the north and no farther because of a parked car. She saw no cars coming from the north. Coming into the intersection, Stoll was traveling about 15 miles an hour. After arriving in the intersection, in just a "split second" she saw the car coming from the north on her side of the car. The Stoll car was in the intersection just about its car length when she saw the Maska car. The Stoll car hit a parked car at the southwest corner of the intersection where it came to rest.

On cross-examination she testified that when she saw the Maska car, the Stoll car was just at the middle of

Twenty-ninth Street, the length of the car into the intersection. Both cars did not enter the intersection at the same time, but they reached the point of impact at the same time.

The trial court gave no reasons why it sustained the plaintiff's motion for new trial.

If the trial court gave no reasons for its decision, then the appellant meets the duty placed upon him when he brings the record here with his assignments of error and submits the record to critical examination with the contention that there was no prejudicial error. The duty then rests upon the appellee to point out the prejudicial error that he contends exists in the record and which he contends justifies the decision of the trial court. The appellant then in reply has the right, if he desires, of meeting those contentions. Those errors will then be considered and determined here so far as necessary to the appeal, subject, of course, to the right to notice and consider plain errors not assigned. See, Pongruber v. Patrick, 157 Neb. 799, 61 N. W. 2d 578; Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695, 35 N. W. 2d 772.

The plaintiff contends that the trial court erred in refusing to give the plaintiff's requested instruction No. 1. This instruction was to the effect that the evidence showed without dispute that the defendant was guilty of negligence as a matter of law which proximately caused the accident in suit; and that the jury should return a verdict finding for the plaintiff, and restrict its deliberations to the amount of her damages in accordance with other instructions given by the trial court. This assignment of error raises the question of the sufficiency of the evidence to sustain the verdict.

This court, on many occasions, has stated the rule that in determining the sufficiency of the evidence to sustain a verdict, the evidence must be considered most favorably to the successful party, any controverted fact must be resolved in his favor, and he must have the benefit of the inferences reasonably deducible from the evidence.

In considering this assignment of error, we make reference to section 39-728, R. R. S. 1943, which provides: "Motor vehicles traveling upon public highways shall give the right of way to vehicles approaching along intersecting highways from the right, and shall have the right of way over those approaching from the left when said vehicles shall reach the intersection at approximately the same time. In all other cases the vehicle reaching the intersection first shall have the right of way."

Section 39-751, R. R. S. 1943, provides in part: "When two vehicles approach or enter an intersection at approximately the same time, the driver of the vehicle on the left shall yield the right of way to the vehicle on the right except as otherwise provided in section 39-752. The driver of any vehicle traveling at an unlawful speed shall forfeit any right of way which he might otherwise have hereunder."

The rules applicable to cases involving the duties of drivers approaching and entering intersections have been set forth many times by this court as follows: When a person enters an intersection of two streets or highways he is obligated to look for approaching cars and to see those within that radius which denotes the limit of danger. If he fails to see a car which is favored over him under the rules of the road, he is guilty of contributory negligence sufficient to bar a recovery as a matter of law. If he fails to see a car not shown to be in a favored position, the presumption is that its driver will respect his right-of-way and the question of his contributory negligence in proceeding to cross the intersection is a jury question. Where two motorists approach an intersection at or about the same time, the driver approaching from the right at a lawful speed has the right-of-way, and he may ordinarily proceed to cross, having a legal right to assume that his right-of-way will be respected by the other party, but if the situation is such as to indicate to the mind of an ordinarily careful

and prudent person in his position that to proceed would probably result in a collision, then he should exercise ordinary care to prevent an accident, even to the extent of waiving his right-of-way. One having the right-of-way may not on that account proceed with disregard of the surrounding circumstances, nor is he thereby relieved from the duty of exercising ordinary care to avoid accidents. See Griess v. Borchers, 161 Neb. 217, 72 N. W. 2d 820. See, also, Elliott v. Swift & Co., 151 Neb. 787, 39 N. W. 2d 617; Whitaker v. Keogh, 144 Neb. 790, 14 N. W. 2d 596.

That the car of plaintiff's driver was on the right of defendant's car when each car was approaching the intersection is not in dispute. However, in view of the sections of the statute and the rules as announced in the cases heretofore set out, the question presented is, did the plaintiff's driver have the right-of-way? Or, in the event he had the right-of-way, did the defendant negligently violate that right? Or, did the plaintiff's driver negligently enter the intersection and forfeit any right-of-way he may have had under the existing circumstances?

Under the evidence adduced, we conclude that the question of negligence on the part of either the plaintiff's driver or the defendant was for the jury to determine. No negligence could be imputed to the plaintiff, nor did the trial court instruct that it could.

Where different minds may draw different conclusions from the evidence in regard to negligence, the question should be submitted to the jury. See Griess v. Borchers, *supra*.

The plaintiff contends that the trial court erred in instruction No. 1 in not submitting to the jury the question of whether defendant's rate of speed was excessive under the circumstances.

The plaintiff alleged in paragraph III of her amended petition that the resultant damages and injuries to the plaintiff were directly and proximately caused by the

negligence of the defendant; and in (d) thereunder, "In driving at an excessive, unlawful and reckless rate of speed in view of the circumstances at said time, to-wit: 35 miles per hour."

Section 39-7,108, R. R. S. 1943, provides in part: "(1) No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing. (2) No person shall drive a vehicle in any residence district within any city or village at a speed greater than twenty-five miles per hour unless, by the ordinance of such city or village, a greater rate of speed is specifically permitted. (3) The following speeds shall be prima facie lawful, but in any case when such speed would be unsafe, they shall not be lawful: * * * (b) twenty-five miles per hour in any residence district; * * * (4) The fact that the speed of a vehicle is lower than the foregoing prima facie limits shall not relieve the driver from the duty to decrease speed when approaching and crossing an intersection, * * *."

The defendant testified on cross-examination: "Q- Now, going back for one minute, here, your testimony on direct examination was that as you came up that little, narrow street you could see that there were bushes that blocked your view and hid you over to your right? A- That's correct. Q- And there were some parked cars up in this general vicinity here (indicating)? A- That's correct. (Indicating on a map drawn to scale, Exhibit 1, in evidence. We have heretofore recited in a resume of the evidence that there were cars parked on Twenty-ninth Street.) Q- They also hid you from view and blocked your view? A- Yes. Q- And then as you proceeded to go into the intersection you had to get beyond them, I suppose, before you could look? A- About the sidewalk, you could see. Q- Up about the sidewalk you could see past these parked cars? A- You could get a big look from up behind there. Q- Just about the time you got to here, then you had a fairly open view down that way (indicating)? (As

shown by the evidence this would be to the north.) A- Fairly; yes. Q- And was it at that point that you looked to the north, or was it later? A- I looked at the north and the south both. * * * Q- But you were proceeding at that time between fifteen and twenty miles an hour? A- That's correct. Q- And I believe your testimony was you kept going at a steady rate of speed, just about the same rate, up until the accident? A- That's right. Q- So as you proceeded out of that blind intersection you didn't slow down at all? A- No. * * * Q- And did you see Maska's car at that time? A- No. Q- Did you see him at all before the accident? A- Just maybe a split second before the accident. Q- When the accident was practically over with was when you first saw him? A- Yes."

The plaintiff cites Davis v. Dennert, 162 Neb. 65, 75 N. W. 2d 112, as follows: "The lawfulness of the speed of a motor vehicle within the prima facie limits fixed is determined by the further test of whether the speed was greater than was reasonable and prudent under the conditions then existing."

"What is a reasonable speed is necessarily largely dependent on the situation and the surrounding circumstances, it being obvious that a speed which would be safe, reasonable, and proper in some places and under some circumstances might be highly dangerous, unreasonable, and improper in other places and under other circumstances." Tews v. Bamrick, 148 Neb. 59, 26 N. W. 2d 499. See, also, Granger v. Byrne, 160 Neb. 10, 69 N. W. 2d 293.

This court has considered an almost identical omission in the case of Harding v. Hoffman, 158 Neb. 86, 62 N. W. 2d 333. In that case, quoting in part the language of Hamblen v. Steckley, 148 Neb. 283, 27 N. W. 2d 178, this court said: " 'The material applicable limitations and qualifications upon speed contained therein should have all been included in the instruction to enable the jury to observe and understand the duty of the drivers

in approaching the intersection of narrow country roads at a blind corner where special hazards existed with respect to other traffic by reason of highway conditions.' Such language has application in the case at bar wherein there was competent evidence from which it could have been reasonably concluded that plaintiff's driver was driving at an unlawful rate of speed and that defendant was driving at an unlawful rate of speed, to wit, 30 miles an hour without decreasing same while approaching and crossing the intersection where a known special hazard existed with respect to other traffic or by reason of weather or highway conditions.

"In that connection also, plaintiff, among other things, alleged in her petition that defendant was negligent in that he drove his car 'at a high and dangerous rate of speed, and at a rate of speed greater than was reasonable and proper having regard for the traffic and conditions of the road, and at a rate of speed such as to endanger the life and limb of the plaintiff and the safety of others upon said county road.' As heretofore observed, there was competent evidence in the record supporting that allegation. However, instruction No. 1 erroneously omitted any submission of such issue to the jury. It simply recited an allegation: 'That defendant failed to slacken the speed of his automobile,' without subsequently reciting in any instruction the material applicable statutory limitations and qualifications imposed upon him with regard to speed at the place and under the conditions presented."

There was competent evidence from which it could have been reasonably concluded that the defendant was driving at a rate of speed that was greater than was reasonable and prudent under the conditions then existing in either approaching or entering the intersection. Also, there was competent evidence from which it could reasonably be concluded that the plaintiff's driver was driving at a rate of speed that was greater than was reasonable and prudent under the conditions then exist-

ing in either approaching or entering the intersection. This was an issue for the jury to determine.

In Thurow v. Schaeffer, 151 Neb. 651, 38 N. W. 2d 732, this court held: "The trial court has the duty to instruct the jury on issues presented by the pleadings and evidence, whether requested to do so or not, and a failure so to do constitutes prejudicial error."

We believe the trial court committed prejudicial error in failing to instruct the jury on the issue of speed which was pleaded in the plaintiff's amended petition. No other instructions given by the trial court properly covered this issue.

With reference to the controversy regarding the Municipal Code of the City of Omaha, section 55-7.5 prohibits speed in excess of 15 miles an hour while passing "slow" signs. The plaintiff's driver was faced with a "slow" sign, and there is no dispute but that there is another "slow" sign on the south side of the intersection facing northbound traffic on Twenty-ninth Street. The plaintiff's driver passed the "slow" sign facing him, and was driving toward the intersection at a rate of speed of about 20 miles an hour which he maintained. It appears that the plaintiff's contention is that while an automobile passes a "slow" sign facing his direction of travel, he must not exceed a speed of 15 miles an hour, but as soon as the rear end of his automobile clears the "slow" sign, the motorist may then disregard the "slow" sign and resume a higher speed. We are not in accord with the plaintiff's contention.

While we find no case exactly on this point, we deem the following to have some applicability.

In Safeway Cabs, Inc. v. Honer, 155 Neb. 418, 52 N. W. 2d 266, it was said that when a statute is ambiguous or susceptible of two constructions, one of which creates absurdities, unreasonableness, or unequal operation and the other of which avoids such a result, the latter should be adopted. See, also, Pierson v. Faulkner, 134 Neb. 865, 279 N. W. 813; Ledwith v. Bankers Life Ins. Co.,

156 Neb. 107, 54 N. W. 2d 409. The same rule would apply to a city ordinance.

In Rogers v. Brown, 129 Neb. 9, 260 N. W. 794, the case involved passing a "slow" sign. The court stated that such sign was for the purpose of calling attention of motorists to danger, law, and duty.

In Stevenson v. Sarfert, 310 Pa. 458, 165 A. 225, the court said: "The phrase 'passing a school building' does not limit the application of this humane and salutary provision of the law to the space in the street immediately in front and back and at the sides of a school building." The court was speaking about a section of the statute regulating speed not to exceed 15 miles an hour to the space in the street immediately in front and back and at the sides of a school building.

The ordinance in question prohibits speed in excess of 15 miles an hour while passing the danger of which "slow" signs warn, which we believe would logically and reasonably mean through the intersection and until the motorist had cleared it and gone beyond the "slow" sign in the opposite direction. The plaintiff's contention is without merit.

Other assignments of error relate to instructions which, for the purpose of this appeal, need not be considered, except to say that the definition of "gross negligence" given by the trial court in instruction No. 7 was superfluous and had no relation to the issues in this case. We assume that on a retrial instructions will be given by the trial court as the same may relate to the evidence in that trial.

For the reasons given herein, we conclude that the judgment of the trial court sustaining the plaintiff's motion for new trial should be, and is hereby, affirmed.

AFFIRMED.

CHAPPELL, J., participating on briefs.

ALMA E. JOHNSON, GUARDIAN OF WALTER A. JOHNSON, APPELLANT, V. BOYD A. MAYFIELD ET AL., APPELLEES.

81 N. W. 2d 308

Filed March 1, 1957. No. 34080.

Deeds. In a suit to set aside a conveyance of real property for want of mental capacity on the part of the grantor, the burden of proof is upon the party alleging it to establish that the mind of the grantor was so weak or unbalanced when the conveyance was executed that he could not understand and comprehend the purport and effect of what he was doing.

APPEAL from the district court for Cass County: JOHN M. DIERKS, JUDGE. *Affirmed.*

Francis M. Casey, for appellant.

Moran & James, for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

BOSLAUGH, J.

Walter A. Johnson, named herein as Johnson, was 87 years of age in November 1955. He owned and lived for many years on the northeast quarter of Section 33, Township 10 North, Range 13 East of the 6th P.M., in Cass County. The land had been homesteaded by his father. Johnson was a long-time resident of that part of Nebraska. In recent years he lived with Alma E. Johnson, his daughter, hereafter referred to as appellant, who was a nurse and lived in Detroit, Michigan. Johnson made trips on several occasions between Michigan and Nebraska by himself while he was living in Detroit. The last trip was in June 1955. He was unaccompanied, came to Nebraska City, and made arrangements for his living accommodations there. Appellant was at that time and until after the sale and conveyance by Johnson of the land above described in Detroit, Michigan.

Johnson had expressed an intention and desire to sell his land 6 or 7 years before June of 1955. He then in-

terviewed Robert L. McKissick, an auctioneer, real estate broker, and owner of several farms in Otoe County whose residence and place of business were in Nebraska City. Johnson asked McKissick to sell the land and stated the price he required for it. McKissick went to the land, examined it, and reported to Johnson later that he could not sell it because the amount asked by Johnson was more than the land would sell for at that time.

Johnson made an effort to see McKissick on July 5, 1955, in Nebraska City but was not successful because McKissick was not there that day. Johnson left a message for McKissick and he met Johnson as requested the following day. Johnson told McKissick that he came to Nebraska City a month previous to sell the farm, that he had advertised it for sale and had not been successful, and that his failure to sell the farm was the reason why he came to see McKissick. Johnson said he wanted his farm sold at auction and that he desired Mark Fullriede of the Farmers Bank, who handled some of his business, to clerk the sale. He was told by McKissick that there would have to be a written contract authorizing an auction, that he was also a customer of the Farmers Bank, and that a contract could be prepared and completed there. They went to the bank and a contract was written and executed authorizing an auction sale of the land Saturday, July 23, 1955. Johnson selected the date. He wanted the sale on a Saturday. He arranged, while they were at the bank and while McKissick waited for him, to transfer his checking deposit account from a bank in Detroit to the Farmers Bank in Nebraska City. While at the bank he and McKissick arranged a trip to Plattsmouth the following week to secure publication of advertisements of the sale of the land and a visit to and examination of the farm as to its then condition. They made the trip as planned. Johnson told McKissick while at the farm that it was difficult to properly handle the farm while a long distance from it and that was one reason why he wanted to

sell it. He also said that he could no longer take care of it, that he was not able to drive an automobile, that he thought the thing for him to do was to get rid of it, and that as soon as the farm was sold he thought he would move to Lincoln.

Johnson arranged to have advertisements of the sale published at Plattsmouth and he paid the cost thereof in cash. The date of the sale was changed by Johnson to July 30, 1955, because he thought it better to have more time for publicity of the time and place of the sale. This required another contract in writing authorizing the sale by auction and it was made and executed by Johnson at the Farmers Bank July 25, 1955. Johnson also advertised the sale in the Nebraska City paper.

The auction sale of the land was held July 30, 1955, as stated in the notices of it. There was wide publicity given it. There were 20 or 30 people who attended it —more than normally attend such a sale. The sale was open for bids for about 1 hour. The opening bid was $20,000 and bidding continued until $26,000 was reached. McKissick then called a recess and he, Johnson, and Fullriede, who was clerking the sale, went to the house on the land and conferred. The auctioneer told Johnson who the highest bidder was, the amount he had bid, and his belief that the bidder would not offer a higher amount for the land. Fullriede told Johnson that he thought $26,000 was a fair price for the land. Johnson said he wanted $27,000. The auctioneer made further effort to get a larger offer without success. Johnson directed him to sell it. This direction was made out of the hearing of others. The auctioneer then took Johnson with him and he made another effort for several minutes to obtain a higher bid but he failed. He then asked Johnson what his decision was and he said again, "Sell it" and McKissick did. The bid was $26,000 and the bidder was Boyd A. Mayfield.

A contract of purchase and sale was prepared the day of the auction. It was executed by Johnson and Boyd

A. Mayfield and the purchaser gave a check for $5,200 of the purchase price. The check was endorsed by Johnson, credited to his account in the Farmers Bank the day of the sale, and he at that time paid McKissick his compensation for conducting the sale. On August 1, 1955, the Monday following Saturday, the day of the sale, Johnson executed and acknowledged a deed for the land to the purchaser and his wife as joint tenants. It was complete except as to revenue stamps and was put in Johnson's safety deposit box in the bank ready for delivery when the balance of the purchase price was paid. This was agreed and intended to be March 1, 1956, but by negotiations between the parties completion and final settlement of the transaction was had on August 10, 1955. The deed was delivered to the grantees. A check for the balance of the purchase price was given Johnson and it was deposited to his account in the bank on August 10, 1955. Johnson invested the purchase price of the land in United States bonds secured for him at his request by the Farmers Bank. On the day of the final settlement Johnson went to the bank unaccompanied, got the deed from his safety box in the vault, took it with him from the bank, and later returned to the bank with the check for the net amount of the balance of the purchase price. He did this correctly and without assistance. The time of the final settlement of the transaction was accelerated because Johnson desired to secure interest during the interval to March 1, 1956, on the investment of the proceeds of the sale of the land he contemplated making. He accomplished this by conceding to the purchasers some unattached lumber, posts, and a metal culvert that were stored on the land. Johnson has voiced no objection to or expressed no dissatisfaction with the transaction, nor has he indicated any desire to have the land returned to him.

Appellant learned of the sale of the land of her father by a letter from her cousin, the tenant on the

land. She was a subscriber to and received the daily newspaper published in Nebraska City in which her father had published a notice that he desired to sell his farm, commencing with the issue of June 8, 1955, and continuing through June 28, 1955, and there was a notice published of the auction sale of the land in that paper commencing with the issue of July 8, 1955, through July 29, 1955. The total circulation of the paper was about 6,000. Appellant came to Plattsmouth soon after she learned of the fact of the sale of the land. She has since resided there. The time of her arrival in Nebraska is not disclosed by the record.

Appellant was appointed guardian of her father on September 23, 1955. She commenced this action October 7, 1955, to void the deed he gave to appellees to the land involved herein. The validity of the deed was challenged on the ground, as appellant alleged, that appellees procured its execution by falsely representing to the grantor that the land was not worth to exceed $26,000 when in fact the actual value of it was $45,000, that the grantor was not capable of knowing the value of the land, and that he was misled by the false representation of appellees as to its true value to his financial loss and damage. Boyd A. Mayfield, who attended the sale and was the successful bidder for the land, first met Johnson in 1946. He learned of the sale by a notice he saw in the Nebraska City paper. He had no conversation with Johnson concerning the land, its value, or at all until after the sale. He could not recall while testifying that he had ever had a conversation with Johnson on any subject before that time. The record does not show that he authorized anyone to discuss anything about the land on his behalf with Johnson or anyone representing him. The first time he met and said anything to Johnson concerning the land was after the sale when he, McKissick, Fullriede, and Boyd A. Mayfield went in the house on the land and the contract for the sale of the land was prepared and executed and the

purchaser wrote and delivered his check to Johnson for $5,200 of the purchase price of the land. There is no proof that either of the appellees made any representation to Johnson concerning the land or its value.

Appellant also alleged as a basis of the invalidity of the deed that Johnson was, when the land was sold and when he executed and delivered the deed, feeble and infirm in body and mind, was then 87 years of age, was not mentally competent to execute the deed, and was not mentally capable of understanding his actions or their effect.

The proof produced by appellant in this regard was, in substance, as follows:

Johnson in 1952 was paid $950 by check of the clerk of the district court for Cass County, Nebraska, the damages for right-of-way across his land for a power line. He repeatedly and continuously maintained he did not receive the check or the money due him on that account. The canceled check purportedly endorsed by him was produced by the clerk and Johnson denied the endorsement of the check was written by him. The check was traced to the bank and the deposit of it in the account of Johnson in the Farmers Bank of which he was a customer. Notwithstanding all this he steadfastly maintained that he did not receive or endorse the check for the money and funds it represented.

In the summer of 1953 Johnson had been in poor health and under the care of a doctor. He was on a street in Detroit, became dizzy, lost his balance, and fell. A doctor called found that Johnson was quite an ill man. The doctor diagnosed his illness as a light stroke. There was and has since been a change in his mental condition. He has since been quite forgetful and he has constantly proclaimed and maintained, for 5 or 6 years, that he has worms and lice. He thinks they are in the house and in the bedding. His conversation is not coordinated. He drifts from the present into the past. He attempts to discuss a subject, is not able to continue, but suddenly

passes to some other matter not connected with what originated the conversation. At times his conversation is incoherent. He has been under a doctor's care for 5 or 6 years and during that time he has been in the hospital at intervals. He was in the hospital near Christmas on account of arteriosclerosis and the fall before the trial he was in St. Joseph's Hospital in Omaha due to a circulatory condition. He had the attention of four or five Omaha doctors at that time.

Appellant has been a registered nurse engaged in the practice of her profession for more than 20 years, has had occasion to observe many psychiatric patients, and knows how to recognize a person of unsound mind. She expressed the opinion that her father was not mentally capable of transacting business and that he had been mentally disturbed for the last 4 or 5 years.

Appellant took her father to Omaha to consult Dr. Chester H. Farrell who was licensed to practice his profession in this state in 1932. He has and does practice in the field of neuropsychiatry. He had extensive instruction and training preparatory to the practice of his profession and has had large experience in the practice in the field in which he has specialized. Johnson was admitted to St. Joseph's Hospital October 10, 1955, and he remained there for 18 days. He was observed, examined, and studied during that time by Dr. Farrell and other specialists who were associated at his instance. Dr. Farrell found that Johnson had somatic delusions, one of which was that he had a skin disease caused by a parasite. It was established while he was at the hospital that he did not have such a disease. Another delusion he had was that he had a snake infesting the inside of his intestinal tract. He maintained he passed the snake at intervals. He described it in a characteristic way. He said it had red eyes that look at you and it had an octagonal design on its body. It was determined that he had no such infestation. Both of these beliefs of Johnson were definitely delusional. It

was found that Johnson had gross memory defect for both remote and recent events. The doctor, from his clinical impression and his psychological study, found that Johnson was definitely mentally ill and had been for a considerable duration, probably since sometime after the stroke he had 6 or 7 years before. It was the opinion of the doctor that Johnson was the same in July (1955) as he was in October (1955). He thought Johnson had been mentally ill for a long time. He explained that by mentally ill he meant that Johnson was not responsible, had an organic psychosis that had been brought on by age or physiological changes of the blood vessels, and that the psychosis was associated with advanced arteriosclerosis. In the opinion of the doctor Johnson did not on July 1, 1955, or on August 1, 1955, completely know the nature or extent of his property; that on July 30 and August 1, 1955, he was insane; that he had been insane for 5 or 6 years; and that his insanity was permanent. During his stay in the hospital he would become confused, get in the wrong room, and misidentify people. He would be garrulous one day and complaining the next. He complained of weakness and shortly thereafter would want to take a long, brisk walk. He got lost in the hospital. He was a kindly person, not troublesome, and an elderly man. All these things were taken into consideration by the examiner. The doctor said that Johnson had lucid intervals when he was not under stress and when everything was going along normally he could think clearly. The doctor was averse to attempting any opinion as to the duration of the lucid intervals but did suggest that they might be a matter of hours.

Johnson was at the home of the tenant of his land, who was also his nephew, about 2 weeks before the sale of the land. Johnson had Sunday dinner with his tenant and his family. The relationship and experience of the tenant and Johnson during the 4 years tenant had farmed his land had been pleasant and satisfactory.

Johnson and his nephew were friendly. Johnson said nothing to his tenant about a contemplated sale of the land though an auction sale of it was then being advertised or that Johnson desired or intended to terminate the tenancy of the tenant and cause him to surrender possession of the land. A couple days later Johnson had the sheriff of the county serve the tenant with a notice terminating tenancy of the tenant and demanding that he surrender possession of the land.

There was testimony of a witness of doubtful qualification who stated in his opinion the farm that was sold to appellees was, at the time of the sale, of the fair and reasonable value of $33,100.

The foregoing is the essence of the proof offered by appellant to support her claim that her father was of unsound mind and incapable of knowing or realizing what he was doing or the effect of what was done when he sold his farm to appellees.

It is significant that the tenant on the Johnson land was a witness produced by appellant and that he told of conversations he had with Johnson on the Sunday he was at the home of the tenant for dinner about 2 weeks before the sale of the land but the tenant was not asked what he had observed or learned about the condition of Johnson physically or mentally during the years he had known Johnson and during the 4 years that he was a tenant on the Johnson land. Likewise, there were 20 or more persons who attended the sale of the land. They had an opportunity to see and observe Johnson on the very day of the transaction involved. Johnson had lived on the land for almost a lifetime. An inference may be drawn from the record that he was well known in the surrounding area. Not one of these persons appeared at the trial to attest any disability or deficiency of Johnson either physical or mental.

Appellees produced the opinion of a thoroughly qualified real estate owner and dealer that the fair and reasonable value of the Johnson land at the time it was

sold was $24,000. The description of the land and improvements thereon contained in the record is not impressive. Johnson had charge of and conducted his affairs until after the sale of the land, at least until the daughter got herself appointed his guardian. There is not the slightest indication in the record of any improper or improvident act or transaction by Johnson. The purport of the evidence in this regard is convincing that he was a careful, prudent, and responsible individual. When he returned to Nebraska in June of 1955 he had a deposit account in the Farmers Bank of Nebraska City of more than $26,000. When he sold the land he invested the proceeds of the sale in United States bonds. The record is convincing that while Johnson was an old man and the eroding effect of time and age had to some extent taken its toll, he was not imprudent or incapable of knowing and understanding what he did.

The grantor was past 86 years of age at the time of the transaction involved herein. There is no presumption that a person of advanced years is incapable of transacting business. A litigant alleging that condition has the burden of establishing it. It is generally accepted that great age is an important factor to be considered with other evidence in appraising mental competency. It alone is not decisive. The law affirms the right of the aged to control and dispose of their property. There is an accumulation of proof that the ability to think, to deliberate, and to decide justly and prudently survives youth and middle age. It has often been considered that imbecility or weakness of mind does not void a deed and the fact that mental powers have been to some extent impaired by age or disease is not sufficient if the grantor has a comprehension of the meaning and effect of his act.

The burden of proof in an action to set aside a deed because of mental incapacity of the grantor is on the litigant who asserts it. It is said in Lund v. Woodward, 137 Neb. 689, 291 N. W. 90: "In a suit to set aside a

conveyance of real property for want of mental capacity on the part of the grantor, the burden of proof is upon the party alleging it to establish that the mind of the grantor was so weak or unbalanced when the conveyance was executed that he could not understand and comprehend the purport and effect of what he was doing." See, also, Eggert v. Schroeder, 158 Neb. 65, 62 N. W. 2d 266; Kiihne v. Charf, 149 Neb. 271, 30 N. W. 2d 914; Smith v. Black, 143 Neb. 244, 9 N. W. 2d 193.

The district court found that appellant failed to sustain the allegations of the petition and that the grantor was competent to transact business during the times important to this litigation. It rendered a judgment of dismissal of the case and denied the motion of appellant for a new trial.

This is an appeal in an equity case. The specifications of the procedure for the trial of an appeal in such a case in this court have been often stated. Keim v. Downing, 157 Neb. 481, 59 N. W. 2d 602; Hipsley v. Hipsley, 162 Neb. 518, 76 N. W. 2d 462. These have been observed in the consideration and decision of this appeal.

The record fails to establish either of the grounds alleged in the petition of appellant as a basis for the relief sought by her. The record fails to show that the mind of the grantor was so weak or unbalanced when the sale was had and the conveyance was made by him that he could not understand and comprehend the effect of what he did. The deed in issue was a valid conveyance of the land to appellees.

The judgment should be and it is affirmed.

AFFIRMED.

FRANCENA ANDERSON, FORMERLY FRANCENA WILCOX, APPELLANT, V. HARLEY M. WILCOX, APPELLEE.

81 N. W. 2d 314

Filed March 1, 1957. No. 34081.

1. **Divorce.** In a divorce action, wherein a divorce has been granted and the custody of children has been fixed, the court in a proper proceeding may, where the circumstances of the parties have changed or it shall be to the best interests of the children, modify the decree as it concerns the care, custody, and maintenance of the children or any of them, as authorized by section 42-312, R. R. S. 1943.
2. ———. Custody of minor children awarded to their mother in a divorce action will not be disturbed in a subsequent proceeding to modify the original decree, unless by changed circumstances it is affirmatively shown that the mother is an unfit person to have their custody, or that the best interests of the children require such action.

APPEAL from the district court for Jefferson County: CLOYDE B. ELLIS, JUDGE. *Reversed and remanded with directions.*

Melvin Moss, for appellant.

Albert M. Detmer and *Ernest A. Hubka,* for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CARTER, J.

This is an appeal from an order of the district court modifying a decree of divorce by changing the custody of two children from the mother to the father. The mother, Francena Anderson, appealed from the order and will be hereafter referred to as the appellant. The father, Harley M. Wilcox, will be referred to as the appellee.

On August 11, 1950, the appellant was granted a divorce from the appellee on the ground of extreme cruelty. The custody of the two minor children, Donna and David, was granted to the appellant. On December 13, 1951, the decree was modified to permit the appellant

to remove the children to Perry, Kansas, and the support money for each child was reduced from $35 to $25 per month. On January 22, 1955, the appellee filed an application for a modification of the decree of divorce praying that the custody of the two children, Donna and David, be granted to him because of changed conditions alleged to warrant such action. The trial court sustained the application and the appellant has appealed therefrom.

The evidence shows that appellant had been married previous to her marriage to the appellee and had two children, Jean and Angela, by the previous marriage. Two children, Donna and David, the children here involved, were born to the parties to this action. Subsequent to the granting of a divorce from the appellee, appellant married Arthur Anderson. As a result of this marriage two children, Celesta and Jonathan, were born. Consequently, at the time the modification was sought, appellant had the care and custody of her six children, Jean 17, Angela 14, Donna 12, David 9, Celesta 3, and Jonathan 1½ years of age.

Appellant's present husband, Arthur Anderson, had been twice married previous to his marriage to the appellant, and had 12 children as a result of these marriages. The three younger ones, Arthur, Jr., 16, George 11, and Dwight 10, were in Anderson's care and custody and came into the home after his marriage to the appellant. Consequently, at the time of the hearing on the application to modify the decree in the district court, appellant's family consisted of her husband and 9 children ranging in age from 1½ to 17 years, which included the 6 children of her own who had been with her since birth.

The record shows that in January 1953, appellant and her husband moved to Ozawkie, Kansas, where they purchased a 70-acre tract of land approximately one-half mile north of the village. They and the 9 children moved into a house located on the land. The house was small

and the family somewhat crowded during the period they occupied it. Domestic difficulties arose and in August 1955, appellant and her 6 children moved into what is designated as the telephone exchange building in the village of Ozawkie. Appellant operates the telephone switchboard and lives in the quarters provided for the operator. It is a 5-room house consisting of a combination dining room and kitchen, a living room in which the switchboard is located, two bedrooms, and an enclosed porch which can be used except in bad weather. The home does not have running water or inside toilet. There is no sewerage system in Ozawkie. The evidence of persons acquainted with the home is that it was clean and neat, and maintained in an orderly manner. The evidence shows that the children, Donna and David, were kept clean and neatly dressed, and appeared to be healthy and adequately nourished. Both attended school regularly and had better than average grades. The children attended Sunday School and church with some degree of regularity. The general reputation of the appellant was good and the children appear to have conducted themselves much the same as other children of the community. There is some evidence of quarreling among the children, but it does not appear to have been any different than that which usually occurs in a large family.

The appellant receives $50 per month for the support of Donna and David. She earns $75 per month for operating the telephone switchboard and pays $14.50 for rents, utilities, and social security. She has earned small amounts from other sources. Her husband provides potatoes, milk, and some groceries. Angela operates a paper route which pays from $20 to $25 per month. The appellant testified that her income is sufficient to properly care for herself and the children. It is quite evident that the situation, so far as the children are concerned, is much better than it was when they lived on the farm.

The appellee owns and occupies a modern 6-room home in Fairbury, Nebraska. He is a railroad engineer with a net income of $449 per month. He has made his child-support payments regularly and has assisted the children materially in addition thereto. Appellee is away from home for periods of time while engaged in his work on the railroad. He would be dependent upon the hiring of competent help to care for the children. His reputation is good and his affection for the children sincere. He has a better house and better furnishings than the appellant.

We have difficulty in determining the changed conditions upon which the appellee relied to secure a modification of the decree. He has a better house and furnishings, and more earning capacity than the appellant, but these are not controlling factors. The appellant had remarried but at the time of the hearing she was living alone with her children the same as she did prior to her marriage with Anderson. The evidence will not sustain a finding that the children are neglected, undernourished, or abused. The evidence indicates that appellant has a good reputation, is a good homemaker, and loves her children. The children have been raised together as one family since their births and get along together as normal children do. There is some evidence that appellant has some belief in prophetic warnings and visions, but there is no evidence that it has had any unfavorable effects upon the children. The record indicates that the life of appellant is difficult, and that she must work hard and be frugal in order to properly care for her children. This is no evidence requiring her to give up her children in the absence of evidence that she is not a fit and proper person to have their custody. This is so even if others seeking their custody may have the means to better maintain and care for the children.

We point out that the divorce involved in this case was granted to the appellant. She stands in the posi-

tion of the innocent party. The court by its decree found the appellant to be a fit and proper person to have the care and custody of the children. It is the rule in this state that where the custody of minor children is awarded to the mother in a divorce proceeding, such custody will not be disturbed in a subsequent proceeding to modify the decree unless it is affirmatively shown by a change of circumstances that the mother is an unfit person to have their custody, or that the best interests of the children require such action. Campbell v. Campbell, 156 Neb. 155, 55 N. W. 2d 347; Bath v. Bath, 150 Neb. 591, 35 N. W. 2d 509. The propriety of the award of custody to the appellant in the divorce decree cannot be here questioned. The basis for the modification as to custody is that there have been changed conditions which require a change in the custody of the children. The basis for the modification of the decree is section 42-312, R. R. S. 1943, which provides: "If the circumstances of the parties shall change, or it shall be to the best interests of the children, the court may afterwards from time to time on its own motion or on the petition of either parent revise or alter, to any extent, the decree so far as it concerns the care, custody and maintenance of the children or any of them." In the absence of changed conditions the modification must be denied. Stanley v. Stanley, 155 Neb. 125, 50 N. W. 2d 558; Blue v. Blue, 152 Neb. 82, 40 N. W. 2d 268; Harris v. Harris, 151 Neb. 191, 36 N. W. 2d 849. We find no evidence in this record that can sustain a finding that the appellant is not a fit and proper person to have the care and custody of her two minor children, Donna and David.

The question then arises: Do the best interests of the children require that their custody be taken from the mother and given to the father? We think not. The two children were 5 and 3 years of age when the divorce was granted. They have been under the care and supervision of the mother since that time. They have been

reared in close association with Jean and Angela since their birth and with Celesta and Jonathan since the latter were born. They get along well with their mother and the other children in the family. The evidence shows that they are developing as normal children. We think it would not be to the best interests of these children to take them from the only environment they have ever known and place them under the care of a father 62 years of age who must employ strangers to substitute for the care of the natural mother and the association of the half brother and sisters. The natural attachments that have grown out of this environment should not be disturbed except for the most cogent reasons. None is here shown. Gorsuch v. Gorsuch, 143 Neb. 572, 10 N. W. 2d 466. We do not doubt that the appellee can provide certain advantages that the appellant cannot. On the other hand, the appellant as the natural mother who has cared for them since birth can provide other advantages that the appellee cannot replace. Since the record establishes that these two children are being adequately supported, educated, and trained by their mother, who is shown to be a fit and proper person to have their custody, we are drawn to the conclusion that a change of circumstances requiring a change of custody of the children is not sustained by the record.

The judgment of the district court is reversed and the cause remanded with directions to enter an order retaining the custody of the children in the mother, fixing the right of visitation by the father, and such other relief as the court deems proper, not inconsistent with this opinion. Appellant is allowed $250 for services of her attorney in this court.

REVERSED AND REMANDED WITH DIRECTIONS.

KENNETH L. PURDUM ET AL., APPELLEES, V. GERTRUDE SHERMAN ET AL., APPELLANTS.

81 N. W. 2d 331

Filed March 1, 1957. No. 34100.

1. **Adverse Possession.** The claim of title to land by adverse possession must be proved by actual, open, exclusive, and continuous possession under a claim of ownership for the statutory period of 10 years.
2. ———. Where one by mistake as to the true boundary line enters upon and takes possession of lands of another, claiming it as his own to a definite and certain boundary, by an actual, open, exclusive, and continuous possession thereof under such claim for 10 years or more, he acquires title thereto by adverse possession.
3. ———. It is the visible and hostile possession, with an intention to possess land occupied under a belief that it belongs to the possessor, that constitutes its adverse character. Ordinarily the hidden or remote view or belief of the possessor in taking possession does not relate itself to the adverse character of the possession.

APPEAL from the district court for Thomas County: WILLIAM F. SPIKES, JUDGE. *Reversed and remanded with directions.*

Courtney L. Vallentine and *Stubbs & Metz,* for appellants.

Dryden & Jensen, for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CARTER, J.

The plaintiffs brought this suit to quiet title as against the defendants to the southeast quarter of the northwest quarter and the northeast quarter of the southwest quarter of Section 31, Township 24 North, Range 29 West, Thomas County, Nebraska. The defendants Ball are the owners of the southwest quarter of the northwest quarter of Section 31 and they claim by adverse possession east of their east line thereof to the west

fence on the Chicago, Burlington & Quincy Railroad right-of-way, an area of 6 acres more or less. The defendant Sherman is the owner of the northwest quarter of the southwest quarter of Section 31 and she claims by adverse possession east of her east line thereof to the west fence on the Chicago, Burlington & Quincy Railroad right-of-way, an area of approximately 16 acres. Upon a trial to the court on the issues thus raised, the trial court found for the plaintiffs and quieted title in them, fixing the west boundary of plaintiffs' lands in accordance with a survey made at the instance of plaintiffs and set forth in the evidence. The defendants have appealed.

The plaintiffs became the record title owners of the southeast quarter of the northwest quarter and the northeast quarter of the southwest quarter of Section 31, except the railroad right-of-way, on November 2, 1943, by deed. The defendants Ball became the record title owners of the southwest quarter of the northwest quarter of Section 31, except the railroad right-of-way, by deed recorded on January 24, 1938. The defendant Sherman became the record title owner of the northwest quarter of the southwest quarter of Section 31 by deed recorded April 1, 1940.

On or about June 20, 1953, plaintiffs employed Albert J. Van Antwerp, a qualified surveyor, to establish on the ground the west line of their land heretofore described in accordance with the description contained in their deed. The surveyor fixed the boundary line between the lands owned by the defendants and the plaintiffs. It is marked at a point located at the southeast corner of the northwest quarter of the northwest quarter by a stake, which stake is 15.91 chains due east from an old red cedar post located at the southwest corner of the northwest quarter of the northwest quarter of Section 31. The line from the last-mentioned stake runs south to another stake located at the southeast corner of the southwest quarter of the northwest quarter of

Section 31, which latter stake is located 15.84 chains due east of the government corner located at the southwest corner of the southwest quarter of the northwest quarter of Section 31. The line runs thence due south to a third stake located at the southeast corner of the northwest quarter of the southwest quarter of Section 31, which is 15.76 chains due east of the southwest corner of the northwest quarter of the southwest quarter of Section 31, which last-mentioned corner is fixed at a point 20.09½ chains due south of the government corner described as being located at the southwest corner of the southwest quarter of the northwest quarter of Section 31. The old red cedar post, located at the southwest corner of the northwest quarter of the northwest quarter of Section 31, is 20.06 chains due north of the government corner heretofore described as being located at the southwest corner of the southwest quarter of the northwest quarter of Section 31. The line drawn through the three stakes is the boundary line between the lands of plaintiffs and defendants determined by government surveys, the deeds of the parties, and the survey marked on the ground by Van Antwerp. Section 31 is a short section which accounts for the variance in the regularity of the tracts involved in the dispute. The line thus marked on the ground appears to have been accepted by the parties, at least no claim is made in this court that the boundary line established by Van Antwerp was incorrect. According to the survey, the railroad right-of-way crosses the northeast quarter of the southwest quarter and the southeast quarter of the northwest quarter of Section 31 in such a way as to leave approximately 16 and 6 acres, respectively, west of the west right-of-way fence within the described tracts.

It is the contention of the defendant Sherman that she has been in possession of and used the lands between her east line as fixed by Van Antwerp and the west fence on the railroad right-of-way for more than 10 years. The evidence shows the land in dispute is

grazing land. No fence was ever built which purported to be a line fence between plaintiffs and the defendant Sherman until after the Van Antwerp survey, which fence was immediately removed by the defendant Sherman. The Sherman cattle grazed to the west fence of the railroad right-of-way since the defendant Sherman became the owner, except in the years 1943, 1944, and 1945. It appears that during these 3 years the plaintiffs leased the northwest quarter of the southwest quarter of Section 31 from the defendant Sherman. They grazed the disputed lands in connection with the lands leased. When the lease expired, plaintiffs admit they gave up possession to the defendant Sherman and never attempted to take possession again until after the survey was made in 1953. The evidence of the defendant Sherman is that she had always claimed to the west fence on the railroad right-of-way and that she openly and exclusively used it as her own.

The plaintiffs claim that they had asserted their title to the disputed tract by paying the taxes, placing a mortgage on the land, by executing an oil and gas lease, and in securing a permit for a railroad crossing in 1948. The taxes, mortgage, and mineral lease included the disputed acreage only by the use of the description of the northeast quarter of the southwest quarter of Section 31 as it appeared in their deed. They indicate nothing more than the deed itself. With reference to the permit to cross the railroad right-of-way, it appears that plaintiffs had other lands west of the railroad right-of-way on which they grazed their cattle. There is no evidence that plaintiffs made any use of the permit, in fact the evidence shows that they crossed the railroad at a point further south and crossed the Sherman lands to make use of lands which did not include the disputed tract. There was no use of the right-of-way crossing which conflicted with the defendant Sherman's possession and use of the disputed tract of land. The evidence of Gertrude Sherman is that she did not know where

her east boundary line was, but that she always thought it was the west fence of the railroad right-of-way. She stated also that it was on this belief that she claimed and used the lands up to the west fence of the railroad right-of-way.

It is the rule in this state that if one by mistake encloses the land of another and claims it as his own to certain fixed monuments or boundaries, his actual and uninterrupted possession for 10 years or more will operate as a disseizin and his title will be perfect. Tex v. Pflug, 24 Neb. 666, 39 N. W. 839, 8 Am. S. R. 231; Hallowell v. Borchers, 150 Neb. 322, 34 N. W. 2d 404. It seems clear to us that the disputed land was unenclosed except within the west fence of the railroad right-of-way. There was not and never had been a fence between the Sherman land and the disputed tract. The cattle of the defendant Sherman had grazed over the whole of it up to the right-of-way fence in excess of the statutory period of 10 years.

The plaintiffs contend, however, that the defendant Sherman had never actually claimed the disputed tract and that her use of it was based only on a mistaken belief that the west fence on the railroad right-of-way was the true boundary line. The evidence sustains this contention. The fact that one claiming title by adverse possession never intended to claim more land than is called for in his deed is not a controlling factor. It is the intent with which possession is held rather than an intention to hold in accordance with his deed that is controlling. The claim of adverse possession is founded upon the intent with which the occupant had held possession, and this intent is ordinarily determined by what he has done in respect thereto. Hallowell v. Borchers, *supra.*

The rule is stated in Annotation, 97 A. L. R., p. 58, as follows: "In a steadily increasing number of jurisdictions, the possession is the important element, and it is held that such possession is not the less adverse because

the person takes possession of the land in question innocently and through mistake. In other words, it is the visible and adverse possession, with an intention to possess land occupied under a belief that it is the possessor's own, that constitutes its adverse character, and not the remote view or belief of the possessor. Or, as said in 1 R. C. L. 733, 'the mere fact of possession is allowed to override the intention; and it is held that a possession beyond the true boundary lines, irrespective of the intention with which it was taken, becomes adverse.'" This statement was approved by this court in Hallowell v. Borchers, *supra*. See, also, Jurgensen v. Ainscow, 155 Neb. 701, 53 N. W. 2d 196. It is evident, therefore, that while defendant Sherman did not know where the true boundary was, as shown by her deed, she occupied and used the disputed tract for grazing purposes for more than 10 years under the belief that the west fence on the railroad right-of-way was the boundary. It is evidence which establishes a use showing actual, open, exclusive, and continuous possession, and when such use has existed for the statutory period of 10 years, it is sufficient to sustain a claim of title by adverse possession.

The main contention advanced by the plaintiffs in this case is that the evidence will not support a finding that possession was taken and held under a claim of right, or title, or ownership. What constitutes such a claim has been one of the most controversial points in the law of adverse possession, and it has been most controversial where possession of the land has been taken under a mistake as to the location of the true boundary. We do not choose to belabor the question in this opinion, but since Hallowell v. Borchers, *supra*, we think the rule in this state has been as follows: Adverse possession is founded upon the intent with which the occupant has held possession and this intent can best be determined by his acts in relation thereto. The fact that a claimant may state that he never intended to claim

more land than was called for by his deed may or may not be given weight dependent upon the circumstances of each case. Ordinarily, however, in case of a mistaken boundary, more weight will be given to the nature of the possession of the occupier than to the mistake that was its cause. The law contemplates that one's rights in land may be lost to another by adverse possession. The real purpose of prescribing the manner in which an adverse holding will be manifested is to give notice to the real owner that his title or ownership is in danger so that he may within the period of limitation take action to protect his interest. It is the nature of the hostile possession that constitutes the warning, not the intent of the claimant when he takes possession. When, therefore, a claimant occupies the land of another by actual, open, exclusive, and continuous possession, the owner is placed on notice that his ownership is endangered and unless he takes proper action within 10 years to protect himself, he is barred from action thereafter and the title of the claimant is complete. It can readily be seen that the intent with which the claimant first took possession of the disputed tract is not ordinarily of too much significance. The title of the true owner is lost by his inaction. It would seem, therefore, that when the possession of the land of another, no matter what the intention may have been in making the first entry, amounts to that which the law deems as adverse to the true owner and such possession continues for the statutory period of limitation of 10 years, the adverse holding ripens into ownership in the absence of explanatory circumstances affirmatively showing the contrary such as occupancy under a lease, an easement, or a permissive use. City of Rock Springs v. Sturm, 39 Wyo. 494, 273 P. 908, 97 A. L. R. 1. See Annotation, 97 A. L. R. 14.

It is the contention of the defendants Ball that they have been in possession of and used the lands between their east line as fixed by Van Antwerp and the west

fence on the railroad right-of-way for more than 10 years. This tract was used primarily for grazing purposes, although there is evidence that hay was sometimes taken from it. No fence was ever built which purported to be a line fence between plaintiffs and the defendants Ball until after the Van Antwerp survey, which fence was immediately removed by the Balls. From the time the Balls became the owners in 1938 their cattle grazed to the west fence line on the right-of-way. The evidence shows an exclusive and continuous use of the 6-acre tract involved for more than 10 years. There is evidence that plaintiffs obtained a part of the hay cut on this tract in 1945. This was at a time when plaintiffs were in possession of the Sherman land to the south under lease. The defendants Ball had no knowledge that plaintiffs took any hay from the 6-acre tract in 1945. It is evident that any hay so taken was in their status as tenants under the Sherman lease. There is no evidence that they obtained the hay under any claim of ownership of the tract. There is some evidence that plaintiffs Purdum took some hay off of the disputed tract in 1949. The defendants Ball knew nothing of it. Plaintiff Kenneth L. Purdum talked with Balls' hired man who told him to take what he thought was his. He does not appear to have claimed the hay as owner of the land. It appears also that the statutory period of 10 years had run at the time of this incident. The plaintiffs contend, as they did in defending the claim of the defendant Sherman, that the defendants Ball did not know where the true boundary line was and that they actually claimed nothing more than to the true boundary. It is clear, however, that they used and occupied the land up to the west fence of the right-of-way under the belief that it was the boundary line. This is sufficient to establish adverse possession where such possession has been actual, open, exclusive, and continuous for a period of more than 10 years. The authorities cited in support of the Sherman claim also

support the claim of adverse possession of the defendants Ball. We point out that the defendants claim no land east of the railroad right-of-way, including any that might be within the southwest quarter of the northwest quarter of Section 31.

We think the evidence clearly shows on a trial de novo that the defendant Sherman is the owner of all of the north half of the southwest quarter of Section 31 lying west of the west fence on the Chicago, Burlington & Quincy Railroad right-of-way. Also, that the defendants Ball are the owners of all of the south half of the northwest quarter of Section 31 lying west of the west fence on the Chicago, Burlington & Quincy Railroad right-of-way. The judgment of the district court is therefore reversed and the cause remanded with directions to enter a decree quieting title in the defendants Sherman and Ball to the lands claimed by them in accordance with the prayers of their respective answers.

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5. It is the visible and hostile possession, with an intention to possess land occupied under a belief that it belongs to the possessor, that constitutes its adverse character. Ordinarily the hidden or remote view or belief of the possessor in taking possession does not relate itself to the adverse character of the possession. *Purdum v. Sherman* 889

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33. If the time for procuring a bill of exceptions is not extended beyond the 40 days allowed by statute, the bill of exceptions must be settled and allowed not later than 70 days from the date of the filing of the notice of appeal in the district court. *Bryant v. Greene* 497

34. A trial court is without authority to settle and allow a bill of exceptions not prepared in the manner and within the time fixed by the statute. *Bryant v. Greene* 497

35. In the absence of a bill of exceptions it is presumed that an issue of fact presented by the pleadings was established by the evidence, that it was correctly decided, and the only issue that will be considered on appeal is the sufficiency of the pleadings to support the judgment. *Bryant v. Greene* 497
36. Abuse of discretion cannot be presumed, but must be made to appear by evidence before its existence can be found by an appellate court. The burden of showing an abuse of discretion rests on the appellant or plaintiff in error. *Sutton v. State* 524
37. In the absence of a bill of exceptions, the judgment of the trial court will be affirmed if the pleadings are sufficient to support the judgment. *State ex rel. Weasmer v. Manpower of Omaha, Inc.* 529
38. In the absence of a bill of exceptions, it is conclusively presumed that the findings of fact made by the trial court were supported by the evidence. *State ex rel. Weasmer v. Manpower of Omaha, Inc.* 529
39. Harmless error in the admission of evidence is not sufficient ground for the reversal of a judgment. *Bresley v. O'Connor Inc.* 565
40. The admission in evidence of the life expectancy tables was not erroneous under the facts in the case. *Bresley v. O'Connor Inc.* 565
41. It is not error to submit the issue of future pain and suffering to the jury when the evidence shows proof of the same with reasonable certainty. *Bresley v. O'Connor Inc.* 565
42. It is error for the district court to dismiss an appeal from the judgment of a county court for a defective or insufficient bond where the bond given substantially complies with the statutory provisions and is signed by a surety and approved by the county judge. *State ex rel. Miller v. Cavett* 584
43. Surplusage in designation of plaintiff in habeas corpus proceeding did not have the effect of changing the issues or parties to the appeal. *State ex rel. Miller v. Cavett* 584
44. In an appeal to the district court from an order discharging the relator in a habeas corpus proceeding, the relator assumes the position of plaintiff and the respondent that of the defendant. *State ex rel. Miller v. Cavett* 584
45. In an appeal to the district court in a habeas corpus proceeding, it is not required that a writ be issued by the district court. Jurisdiction over the

parties obtains by virtue of the appeal. *State ex rel. Miller v. Cavett* 584

46. Where the record in a law action shows the filing of a motion for a new trial, but no ruling thereon by the trial court, the appeal will be dismissed as prematurely taken. *Mueller v. Keeley* 613

47. Conflicting instructions on issues the effect of which may be to mislead or confuse the jury are erroneous and prejudicial. *Southwell v. DeBoer* 646

48. Where the verdict returned by the jury is the only one authorized by the pleadings and proof, the giving of an erroneous instruction is not prejudicial error. *Southwell v. DeBoer* 646

49. Where contributory negligence is charged against a plaintiff but the physical facts disclose conclusively that he was not so guilty, it is error for the court to submit that question as an issue to the jury. The error is not prejudicial to the defendant making the charge, even if a phase thereof has been improperly defined. *Southwell v. DeBoer* 646

50. Where the verdict in an action for personal injuries is challenged on appeal solely because it is excessive, it will not be disturbed by the reviewing court, unless it can say as a matter of law that, upon consideration of all the evidence, the amount of such verdict is excessive. *Southwell v. DeBoer* 646

51. A verdict may be set aside as excessive by the trial court or on appeal only when it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, mistake, or some means not apparent in the record, or it is clear that the jury disregarded the evidence or rules of law. *Southwell v. DeBoer* 646

52. In an appeal of a criminal proceeding to the district court, the district court is required, by statute, to order the filing of a proper complaint at any stage of the proceedings if the complaint on file is insufficient or defective. *Rolfsmeier v. State* 659

53. The manner in which the district court brings about a compliance with statute requiring filing of original complaint is not material in the absence of a showing of prejudice to the rights of the defendant. *Rolfsmeier v. State* 659

54. Statutory requirement for filing of petition on appeal has no application to appeals to the district court in criminal proceedings. *Rolfsmeier v. State* 659

55. Where the evidence in a criminal case is in con-

flict, it raises an issue for the jury to determine under proper instructions. The verdict of the jury on disputed questions of fact will not be disturbed on appeal if there is sufficient evidence in the record to support its findings. *Rolfsmeier v. State* 659

56. In an action either civil or criminal, tried to the court without a jury, the erroneous admission of evidence is immaterial on appeal where the judgment below is sustained by sufficient competent evidence. *Peterson v. State* 669

57. Upon appeal from an order granting a new trial, the duty rests upon the appellee to point out the prejudicial error or errors which justify the ruling made. *Wright v. Lincoln City Lines, Inc.* 679

58. Where a party is successful in securing the verdict of a jury, he has the right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured. *Wright v. Lincoln City Lines, Inc.* 679

59. The alleged errors that may be considered by the district court are those which are called to its attention by motion or other appropriate pleading. *Wright v. Lincoln City Lines, Inc.* 679

60. Errors sufficient to cause the granting of a new trial must be errors prejudicial to the rights of the unsuccessful party. *Wright v. Lincoln City Lines, Inc.* 679

61. Where an instruction, although erroneous, is not prejudicially so, it is not legal cause or reason for granting a new trial. *Wright v. Lincoln City Lines, Inc.* 679

62. Instructions should be read and construed together, and, if as a whole they state the law correctly, they will be held sufficient, although one or more of them, considered separately, may be subject to just criticism. *Wright v. Lincoln City Lines, Inc.* 679

63. In an equity case appealed to the Supreme Court, if it is desired to review erroneous rulings of the trial court as to reception of evidence, a motion for new trial must be filed and overruled. *Timmerman v. Timmerman* 704

64. Proper course of procedure to raise question of misconduct of attorney in arguing case to a jury stated. *Sandomierski v. Fixemer* 716

65. In an argument to a jury, the making of statements having no support in the evidence, that the defendant would not have to pay the judgment because he

was indemnified in some manner, is such misconduct of counsel as will ordinarily require a reversal. *Sandomierski v. Fixemer* 716

66. Where improper argument to a jury is calculated to distract its attention from the issues and evidence and to induce a larger verdict by injecting prejudicial statements, the verdict cannot be sustained. *Sandomierski v. Fixemer* 716

67. Rule for allowance of attorney's fee in workmen's compensation cases stated. *Haler v. Gering Bean Co.* 748

68. A defendant in a misdemeanor case, desiring to appeal from a lower court to the district court, must substantially comply with the statutory requirements in order to give the latter court jurisdiction. *Anderson v. State* 826

69. The record of the county court, as embodied in a duly authenticated transcript, imports absolute verity and cannot be contradicted in the appellate court by extrinsic evidence. *Anderson v. State* 826

70. When a transcript is filed in time although incomplete, the appellate court acquires jurisdiction of the case. *Anderson v. State* 826

71. Where a party has, within due time, done all that he is legally required to do to perfect an appeal and no fault is shown on his part, or that of his counsel, the district court will not lose jurisdiction of the appeal merely by reason of the fact that the county judge filed an incomplete transcript. *Anderson v. State* 826

72. Rule for consideration of case on appeal from an order granting a new trial stated. *Maska v. Stoll* 857

Attorney and Client.

1. It is the practice in this state to allow the recovery of attorney's fees only in such cases as are provided for by statute, or where the uniform course of procedure has been to allow such recovery. *Timmerman v. Timmerman* 704

2. Only confidential communications to one's attorney are protected by statute. The privilege does not extend to communications made in the presence of others or mere directions given to an attorney acting as scrivener in preparation of instruments. *Short v. Kleppinger* 729

Automobiles.

1. As a general rule it is negligence as a matter of

law for a motorist to drive an automobile on a highway in such a manner that he cannot stop in time to avoid a collision with an object within the range of his vision. *Dryer v. Malm* 72

2. Exceptions to the general rule are situations where on streets or highways the nature of the object or its condition or color in relation to the street or highway may be such as to affect immediate visibility. *Dryer v. Malm* 72

3. Exceptions do not extend to that which is clearly seen or in the exercise of ordinary care would or should have been seen. *Dryer v. Malm* 72

4. The sudden emergency rule cannot be invoked by a party unless there is competent evidence to support a conclusion that a sudden emergency actually existed, unless the party invoking it has not brought the emergency on by his own act, and unless he has used due care to avoid it. *Dryer v. Malm* 72

5. Where a driver of an automobile is suddenly confronted with an emergency requiring instant decision, he is not necessarily guilty of negligence in pursuing a course which mature reflection or deliberate judgment might prove to be wrong. *Kiser v. Christensen* 155

6. The driver of an automobile who becomes frightened and bewildered at the discovery of the near approach of a train at a railroad crossing is not guilty of gross negligence toward his guest where the latter acquiesced in the method of operating the automobile resulting in the creation of the danger. *Kiser v. Christensen* 155

7. A warning of imminent danger to a host by a guest riding in an automobile operated by such host must be made in time to afford the host a reasonable opportunity to avoid an accident, if such warning is to operate to the benefit of the guest. *Kiser v. Christensen* 155

8. What amounts to gross negligence in any given case must depend upon the facts and circumstances. The fact that the operator of the automobile may have been guilty of ordinary negligence is insufficient to warrant a recovery in favor of a guest. *Kiser v. Christensen* 155

9. Duty of motorist stated where snowdrifts or other conditions have left only a narrow lane open for travel. *Pospichal v. Wiley* 236

10. A person is liable for the negligent operation of an

automobile by his servant or agent only where such servant or agent, at the time of the accident, was engaged in his employer's or principal's business with his knowledge and direction. *Pospichal v. Wiley* 236

11. When the driver of an automobile entering an intersection looks but fails to see an approaching automobile not shown to be in a favored position, the presumption is that the driver of the approaching automobile will respect his right-of-way. The question of his contributory negligence in proceeding to cross the intersection is a jury question. *Kohl v. Unkel* 257

12. If the driver of an automobile entering an intersection looks for approaching vehicles but fails to see one which is favored over him under the rules of the road, he is guilty of contributory negligence sufficient to bar a recovery as a matter of law. *Kohl v. Unkel* 257

13. A purchaser who receives possession of a motor vehicle without obtaining the certificate of title thereto, as required by statute, acquires no title or ownership therein. *Burns v. Commonwealth Trailer Sales* 308

14. The possession of a certificate of title to a motor vehicle, although necessary to convey title, is not conclusive of ownership. *Burns v. Commonwealth Trailer Sales* 308

15. One who accepts a certificate of title to a motor vehicle from an agent of the owner is not an innocent purchaser for value where it appears that the purchaser had notice of the agent's want of authority to transfer the certificate of title or to sell the motor vehicle. *Burns v. Commonwealth Trailer Sales* 308

16. A motorist should have his car under such reasonable control as will enable him to avoid collision with other vehicles, assuming that the drivers thereof will exercise due care. *Paddack v. Patrick* 355

17. "Reasonable control" by a motorist is such as will enable him to avoid collision with other vehicles operated without negligence in streets or intersections, and with pedestrians in the exercise of due care; but "complete control" such as will only prevent a collision by anticipation of negligence or illegal disregard of traffic regulations, in absence of notice, warning, or knowledge, is not required by the laws of Nebraska. *Paddack v. Patrick* 355

18. A motorist about to enter a highway protected by stop signs must stop as directed, look in both directions, and permit all vehicles to pass which are at such a distance and traveling at such a speed that it would be imprudent to proceed into the intersection. *Paddack v. Patrick* 355
19. Where a motorist on a nonfavored street stops at an intersecting arterial highway when the intersection is clear of traffic, looks to the right and left for approaching vehicles, acting as a reasonably prudent person in the exercise of due care would act in the belief that he has time and opportunity to safely cross, he is not liable for negligence merely because he attempts to do so. *Paddack v. Patrick* 355
20. A motorist, upon entering an intersection, does not have an absolute right-of-way which permits him to proceed without looking but must continue to maintain a proper lookout for the safety of himself and others traveling upon the streets. *Paddack v. Patrick* 355
21. Where a motorist approaching a through street or highway stops, looks, and sees an approaching vehicle on the favored street or highway but erroneously judges its speed or distance or for some other reason assumes he can proceed with safety and not have a collision, the question of whether or not his conduct in doing so makes him guilty of contributory negligence is usually one for the jury. *Paddack v. Patrick* 355
22. A person traveling a favored street protected by a traffic signal, of which he has knowledge, may properly assume that oncoming traffic will obey it. *Paddack v. Patrick* 355
23. A user of the highways may assume, unless and until he has warning, notice, or knowledge to the contrary, that other users of the highways will use them in a lawful manner, and until he has such warning, notice, or knowledge, he is entitled to govern his actions in accordance with such assumption. *Paddack v. Patrick* 355
24. An essential element necessary to be proved to entitle a passenger in an automobile to recover damages from the host on the ground of negligence less than gross is that he is a passenger for hire. *Lincoln v. Knudsen* 390
25. The substantive law of the case required that plaintiff prove that she was a passenger for hire, and

not an invited guest, as a condition of the right to recover on account of negligence of the defendant less than gross. *Lincoln v. Knudsen* 390

26. The operator of a motor vehicle must give a timely signal of his intention to back when a reasonable necessity for it exists in order that he may yield the right-of-way to and not collide with or injure those lawfully using the street or highway. *Fries v. Goldsby* 424

27. In an action by the legal representative of a deceased guest against a host operator of an automobile, the plaintiff must prove by a preponderance of the evidence gross negligence and that it was the proximate cause of the accident. *Calvert v. Miller* 501

28. Gross negligence within the meaning of the motor vehicle guest statute means great and excessive negligence or negligence in a very high degree. It indicates the absence of slight care in the performance of a duty. *Calvert v. Miller* 501

29. The operation of an automobile at a rate of speed prohibited by law is not in itself gross negligence. *Calvert v. Miller* 501

30. The violation of traffic regulations concerning speed, the giving of signals, or other similar regulations is not negligence as a matter of law of any kind or degree but it is a fact that may be considered with other evidence in the case in deciding an issue of negligence. *Calvert v. Miller* 501

31. When one suddenly moves from the place of safety into the path of a moving vehicle and is struck, his own conduct constitutes contributory negligence more than slight in degree, as a matter of law, and precludes recovery. *Farag v. Weldon* 544

32. The duty of a guest riding in an automobile is to use care in keeping a lookout commensurate with that of an ordinarily prudent person under like circumstances. *Bresley v. O'Connor Inc.* 565

33. Duty of guest riding in an automobile stated. *Bresley v. O'Connor Inc.* 565

34. The duty of a driver of a motor vehicle to sound a horn or give a warning of its approach is not an absolute one but it depends upon the circumstances. *Bresley v. O'Connor Inc.* 565

35. Evidence of the readings of radar equipment designed to determine the speed of moving vehicles is admissible as evidence of speed if a sufficient founda-

tion is laid as to the accuracy of the equipment in operation. *Peterson v. State* 669

36. The testimony of an officer as to the speedometer reading of a car driven by him at a given time is competent prima facie evidence of the speed of the car at the time. Evidence as to the accuracy of the speedometer is not required as a foundation to that evidence. *Peterson v. State* 669

37. A license to operate a motor vehicle in this state is issued, not as a contract, but as a privilege, with the understanding that such license may be revoked for cause by the state. *Durfee v. Ress* 768

38. The revocation of a license to operate a motor vehicle in this state under the point system provided by statute is not an added punishment for the offense or offenses committed as a result of which the points are accumulated. *Durfee v. Ress* 768

39. The purpose of the revocation of a license is to protect the public, and not to punish the licensee. *Durfee v. Ress* 768

40. Where an operator's license is revoked under the point system and the statute has been amended during the period of the accumulation of the points as a result of which the revocation occurs, the amended act controls. Such an application is not ex post facto prohibited by the state and federal Constitutions. *Durfee v. Ress* 768

41. Duties and obligations of a motorist entering an intersection of two streets or highways stated. *Maska v. Stoll* 857

42. Right-of-way rule applicable where two motorists approach an intersection at or about the same time stated. *Maska v. Stoll* 857

43. The lawfulness of the speed of a motor vehicle within the prima facie limits fixed is determined by the further test of whether the speed was greater than was reasonable and prudent under the conditions then existing. *Maska v. Stoll* 857

Boundaries.

Actions in equity are authorized by statute to determine boundaries of real estate, the ownership of which is in whole or in part in dispute. *Elsasser v. Szymanski* 65

Bridges.

1. At common law it was the duty of the county to

build and maintain highway bridges; but if the highway was crossed or disturbed for any purpose by other than highway authorities, it was the obligation of the one interfering with the road to restore it. *Platte Valley P. P. & I. Dist. v. County of Lincoln* 196

2. A county cannot be obligated to maintain a bridge constructed across a ditch of a public irrigation district which intersects a county public highway unless the governing board of the district, before any construction work is done on the bridge, attempts in good faith to negotiate and agree with the county board for the building and maintenance of the bridge and the approaches thereto. *Platte Valley P. P. & I. Dist. v. County of Lincoln* 196

3. Obligation of public irrigation district and county in construction and maintenance of bridge on highway stated. *Platte Valley P. P. & I. Dist. v. County of Lincoln* 196

Children Born Out of Wedlock.

1. Where the sole purpose of an action is to have determined the paternity of a child born out of wedlock, the proceeding must be had in accordance with alternative remedies provided by statute. *Timmerman v. Timmerman* 704

2. In this state, an action for the purpose of legitimating or determining the paternity of a child born out of wedlock and obtaining support and maintenance for such child depends upon statutory authority for its maintenance. *Timmerman v. Timmerman* 704

3. A court of equity, in a case where a sentence or decree of nullity of a marriage has been rendered, may determine the paternity of children born of a void marriage, and make an award for care, custody, and maintenance of such children. *Timmerman v. Timmerman* 704

4. The quality of proof necessary in a proceeding to prove paternity of a child born out of wedlock is sufficient for that purpose in a court of equity in an action wherein the nullity of a marriage is in issue. *Timmerman v. Timmerman* 704

Church.

A church is a building in which people assemble for the worship of God and for the administration of

such offices and services as pertain to that worship. *Calvary Baptist Church v. Coonrad* 25

Constitutional Law.

1. The findings of the Legislature as set out in a declaration of policy contained in an act, while not absolutely controlling, are entitled to great weight in determining the constitutionality of the act. *Omaha Parking Authority v. City of Omaha* 97
2. When an act does not purport to be amendatory, but is enacted as original and independent legislation, and is complete in itself, it is not within the constitutional requirement as to amendments, though it may, by implication, modify or repeal prior acts or parts thereof. *Omaha Parking Authority v. City of Omaha* 97
3. If by a fair and reasonable construction the title calls attention to the subject matter of a legislative bill, it may be said that the object is expressed in the title. It need not be a complete abstract of the contents of the bill. *Omaha Parking Authority v. City of Omaha* 97
4. The lease of public property to a private person may serve a public purpose. An act of the Legislature authorizing such a lease must provide controls for the manner and method of operation to insure its operation for the public good. *Omaha Parking Authority v. City of Omaha* 97
5. A supervisory control of prices to be charged is necessary to a proper leasing of parking facilities under the Parking Authority Law. *Omaha Parking Authority v. City of Omaha* 97
6. Damages for the removal of trees in a public street are not within the recoverable damages provided for in Article I, section 21, of the Constitution of Nebraska. *Weibel v. City of Beatrice* 183
7. The Legislature is without power to provide for the removal of a constitutional officer where the Constitution creates the office, fixes the term, and provides the grounds and manner of removal. *Fitzgerald v. Kuppinger* 286
8. It was intended by the Legislature that statute requiring earlier filing by incumbent should have application and reference to constitutional as well as statutory elective offices. *Fitzgerald v. Kuppinger* 286
9. In the legislative domain and within constitutional

bounds the Legislature is supreme. *Fitzgerald v. Kuppinger* 286

10. The portion of legislative act under attack requiring earlier filing in primary by incumbent officers is unconstitutional as to constitutional officers. *Fitzgerald v. Kuppinger* 286

11. If a portion of a legislative act is unconstitutional and the portion of the act cannot be separated from the other portion or portions and the latter enforced independent of the former, and it further appears that the unconstitutional part constituted such an inducement to the passage of the other parts that they would not have been passed without it, the entire act will fail. *Fitzgerald v. Kuppinger* 286

12. It was intended by the Legislature that the legislation should affect alike constitutional and statutory elective officers and that thus by a disclosed inseparable intention an inducement which invalidated the entire provision was present. *Fitzgerald v. Kuppinger* 286

13. If an act of the Legislature is constitutional in part and unconstitutional in part, the part which is constitutional may not be enforced unless it may be separated in such manner as to leave an independent statute capable of enforcement. *Fitzgerald v. Kuppinger* 286

14. Under the Constitution judges of the district courts, as such, have no inherent judicial authority at chambers and possess only such authority or jurisdiction there as is conferred by statute. *Vasa v. Vasa* 642

15. A license to operate a motor vehicle in this state is issued, not as a contract, but as a privilege, with the understanding that such license may be revoked for cause by the state. *Durfee v. Ress* 768

16. Where an operator's license is revoked under the point system and the statute has been amended during the period of the accumulation of the points as a result of which the revocation occurs, the amended act controls. Such an application is not ex post facto prohibited by the state and federal Constitutions. *Durfee v. Ress* 768

17. If an ordinance purporting to be a police regulation is in fact a revenue measure, it is unconstitutional for the reason that it lacks the element of uniformity necessary to the validity of revenue enactments. A revenue tax may not be imposed under

the guise of a police regulation. *School District of McCook v. City of McCook* 817

18. The collection of money by a city, under an ordinance permitting its payment in a fixed amount within a specified time to avoid prosecution for the violation of a regulatory ordinance under the police power, is a penalty within the meaning of Article VII, section 5, of the Constitution. *School District of McCook v. City of McCook* 817

19. Moneys collected for overtime parking are punitive in character, and not remedial or compensatory to the city, and as such are penalties arising under the rules, by-laws, and ordinances of cities as provided in Article VII, section 5, of the Constitution. *School District of McCook v. City of McCook* 817

20. Article VII, section 5, of the Constitution, is a self-executing provision and funds within its provisions do not lose their character by being otherwise designated in an ordinance of a city. *School District of McCook v. City of McCook* 817

Contracts.

1. Parties who have entered into contracts with the state payable out of public funds are necessary parties to an action to have the contracts declared void and unenforceable. *Haynes v. Anderson* 50

2. While executory and before breach, the terms of a written contract may be changed by a subsequent parol agreement. Such subsequent agreement requires no new consideration. *Carpenter Paper Co. v. Kearney Hub Pub. Co.* 145

3. A contract may be made under such circumstances of business necessity or compulsion as will render the same involuntary and entitle the party so coerced to recover back any money paid thereunder or excuse him from performance. *Carpenter Paper Co. v. Kearney Hub Pub. Co.* 145

4. When such pressure or constraint is brought to bear as will compel a man to go against his will and take away his free agency, thus destroying the power of refusing to comply with the unjust demands of another, it will constitute legal duress. *Carpenter Paper Co. v. Kearney Hub Pub. Co.* 145

5. Conditions under which an agreement is voidable because of duress in the form of business compulsion stated. *Carpenter Paper Co. v. Kearney Hub Pub. Co.* 145

6. The doctrine of expressio unius est exclusio alterius means that the expression in an instrument of one or more things of a class implies the exclusion of all not expressed. *Hafeman v. Gem Oil Co.* 438
7. In the absence of fraud, mistake, or ambiguity a written agreement is the only competent evidence of the contract of the parties and it is not subject to interpretation or construction. *Hafeman v. Gem Oil Co.* 438
8. The intention of the parties to an unambiguous written contract must be determined from its contents. *Hafeman v. Gem Oil Co.* 438
9. If the existence of a written contract has been induced by prior or contemporaneous oral agreement, parol evidence is not admissible to add to or contradict terms of the written contract. *Bitler v. Terri Lee, Inc.* 833
10. In the absence of fraud, mistake, or ambiguity, where negotiations between the parties result in an agreement that is reduced to writing, the only competent evidence of the contract is the writing itself. *Bitler v. Terri Lee, Inc.* 833
11. In order to recover substantial damages for breach of contract, plaintiff must furnish data sufficient to permit the court to determine with reasonable certainty the amount of the damages. *Bitler v. Terri Lee, Inc.* 833
12. Damages are recoverable for losses caused by breach of a contract only to the extent that the evidence affords a sufficient basis of ascertaining their amount in money with reasonable certainty. *Bitler v. Terri Lee, Inc.* 833

Conversion.

1. One who takes possession of a chattel and claims the title and ownership thereof through a purchase from a person having no authority from the owner to dispose of it is guilty of a conversion of the chattel. *Burns v. Commonwealth Trailer Sales* 308
2. In the absence of fraud, conspiracy, or bad faith, a county clerk who has erroneously issued a certificate of title to a motor vehicle may not properly be joined as a party defendant in an action for its conversion, even though it facilitated the conversion in some manner. *Burns v. Commonwealth Trailer Sales* 308

Counties.

1. The state may direct the use, management, and disposition of county property so long as it is done for the benefit of the public in the taxing district. *Omaha Parking Authority v. City of Omaha* 97
2. A statute which expressly imposes the care of poor and destitute persons upon the county is ordinarily mandatory. *Marshall v. County of Nance* 252
3. The powers of a county are limited by statute. A county board can discharge a statutory duty only by the means provided by the Legislature. *Marshall v. County of Nance* 252
4. Questions concerning the liability of a county for the relief of the poor involve the determination of facts by the county board by which any liability on the part of the county is fixed. *Marshall v. County of Nance* 252
5. Before a county can be held liable for the care of a poor person, it must be shown that the county board was given an opportunity to exercise its judgment and discretion in the matter by passing upon the facts necessary to determine the extent of the county's liability, if any. *Marshall v. County of Nance* 252

Courts.

1. A district court cannot acquire jurisdiction of a cause if the court from which the appeal was taken had no jurisdiction of the subject matter. *Lane v. Burt County Rural Public Power Dist.* 1
2. County courts have jurisdiction of actions for the forcible entry and detainer of real estate. *Jones v. Schmidt* 508
3. District courts have no original jurisdiction of cases in forcible detainer. The jurisdiction of district courts in such actions is acquired by appeal or error proceedings. *Jones v. Schmidt* 508
4. An equitable title to real estate and possession thereof may be shown as a defense in an action of forcible entry and detainer. A justice of the peace or a county judge has no jurisdiction to try such a title. *Jones v. Schmidt* 508
5. Where the title to land, which is sought to be recovered in a forcible detainer case, is drawn in question and evidence thereon is submitted in the county court, the district court, on appeal therefrom, is without jurisdiction to hear and to determine the

controversy. In such case, the action stands for dismissal. *Jones v. Schmidt* 508

6. It will be presumed, in the absence of a showing to the contrary, that the discretionary powers of the district court have been wisely exercised. *Sutton v. State* 524

7. Abuse of discretion cannot be presumed, but must be made to appear by evidence before its existence can be found by an appellate court. The burden of showing an abuse of discretion rests on the appellant or plaintiff in error. *Sutton v. State* 524

8. A cause of action for personal injuries alleged to have been proximately caused by negligence of a decedent during his lifetime survives. When no action was brought thereon during his lifetime, it must be prosecuted by a claim filed against the estate of decedent in the county court which has exclusive original jurisdiction thereof. *Storm v. Malchow* 541

9. When a court attempts to render a judgment at a place other than where it is authorized, it has no jurisdiction and its acts possess no validity. *Mueller v. Keeley* 613

10. Courts of general jurisdiction have the inherent power to do all things necessary for the proper administration of justice and equity within the scope of their jurisdiction. *Timmerman v. Timmerman* 704

Criminal Law.

1. Where competent evidence is adduced to support every element of the offense charged in a criminal prosecution, it is ordinarily for the jury to determine if the offense has been established by evidence beyond a reasonable doubt. *Brockman v. State* 171

2. The admission or rejection of cumulative evidence is ordinarily within the trial court's discretion, and its ruling thereon will not be held erroneous by the Supreme Court unless abuse of such discretion clearly appears. *Edmonds v. State* 323

3. In a case where the main fact has been proved and is not disputed, the exclusion of other evidence in support of that fact may not be regarded as prejudicial error. *Edmonds v. State* 323

4. Unless otherwise provided by statute, one charged with a statutory misdemeanor has the right to demand a trial by jury in the county where the offense is alleged to have been committed but may waive his right thereto. *Sutton v. State* 524

5. Where the right of trial by jury has been voluntarily waived by the accused, he thereafter has no right or power at his mere will to withdraw or revoke his waiver and demand a jury trial. *Sutton v. State* 524
6. Whether one accused of crime who has regularly waived a jury trial will be permitted to withdraw the waiver and have his case tried before a jury is ordinarily within the discretion of the trial court. *Sutton v. State* 524
7. While a voluntary confession is insufficient, standing alone, to prove that a crime has been committed, it is, nevertheless, competent evidence of that fact, and may, with slight corroborative circumstances, establish the corpus delicti as well as the defendant's guilty participation. *Cotner v. Solomon* 619
8. In an appeal of a criminal proceeding to the district court, the district court is required, by statute, to order the filing of a proper complaint at any stage of the proceedings if the complaint on file is insufficient or defective. *Rolfsmeier v. State* 659
9. The manner in which the district court brings about a compliance with statute requiring filing of original complaint is not material in the absence of a showing of prejudice to the rights of the defendant. *Rolfsmeier v. State* 659
10. Statutory requirement for filing of petition on appeal has no application to appeals to the district court in criminal proceedings. *Rolfsmeier v. State* 659
11. Where the evidence in a criminal case is in conflict, it raises an issue for the jury to determine under proper instructions. The verdict of the jury on disputed questions of fact will not be disturbed on appeal if there is sufficient evidence in the record to support its findings. *Rolfsmeier v. State* 659
12. Unless otherwise provided by statute, one charged with a statutory misdemeanor has the right to demand a trial by jury in the county where the offense is alleged to have been committed but may waive his right thereto. *Peterson v. State* 669
13. Any probative evidence showing a violation of probationary conditions by conduct sufficient to convince the district court that the defendant will not refrain from criminal acts in the future without punishment will sustain the revocation of probation. *Reinmuth v. State* 724
14. In a proceeding for revocation of probation, proof

of venue within the meaning of criminal law is not necessary. *Reinmuth v. State* 724
15. In a hearing on an application for revocation of probation, the court may exercise broad powers of inquiry in determining whether or not the application should be sustained. *Reinmuth v. State* 724
16. A defendant in a criminal action, who has become a witness in his own behalf, may be subjected on cross-examination to interrogation as to previous conviction of felony. *Reinmuth v. State* 724
17. Where competent evidence is adduced to support every element of the offense charged in a criminal prosecution, it is ordinarily for the jury to determine if the offense has been established by evidence beyond a reasonable doubt. *Fulton v. State* 759
18. Where the evidence is insufficient to support a finding of a lesser degree than that charged in the information, it is not error to refuse to give an instruction defining the lesser offense. *Fulton v. State* 759
19. A defendant in a misdemeanor case, desiring to appeal from a lower court to the district court, must substantially comply with the statutory requirements in order to give the latter court jurisdiction. *Anderson v. State* 826

Damages.
1. General fear, or fear which is not connected with or an incident of knowledge of present or potential danger, cannot be made the basis upon which to predicate depreciation in the market value of land. *Lane v. Burt County Rural Public Power Dist.* 1
2. Fear which may be considered as an element in estimating damages in a condemnation proceeding is defined. *Lane v. Burt County Rural Public Power Dist.* 1
3. Measure of damages in negligence case, and duty of mitigating damages, stated. *Colvin v. Powell & Co., Inc.* 112
4. Where it has been proved that damage has resulted and the only uncertainty is the exact amount, it is sufficient if the record shows data from which the extent of the injury can be ascertained with reasonable certainty. *Colvin v. Powell & Co., Inc.* 112
5. The question of the amount of damage is one solely for the jury. Its action in this respect will not be disturbed on appeal if it is supported by evidence

and bears a reasonable relationship to the elements of injury and damage proved. *Van Wye v. Wagner* 205

6. The fixing of the amount of damages is a function of the jury. Unless it has been shown that the amount fixed is so exorbitant as to indicate passion, prejudice, mistake, or a complete disregard of the law and the evidence, its verdict will be sustained. *Gable v. Pathfinder Irr. Dist.* 349

7. When it appears from the record that the verdict in a case is so clearly exorbitant or excessive as to indicate that it was the result of passion, prejudice, or mistake, or some means not apparent in the record, or it is clear that the jury disregarded the evidence or rules of law, then it is the duty and power of the trial court and of the Supreme Court to set aside a verdict for damages so large that it does not find support in the evidence. *Paddack v. Patrick* 355

8. Where a buyer wrongfully neglects or refuses to accept and pay for goods, the seller may maintain an action for damages for nonacceptance. Generally, the measure of damages is the difference between the contract price and the market value, if there is a market value, at the time fixed in the contract, or the refusal to accept. *Ord v. Benson* 367

9. In consideration of diminution of earning capacity, plaintiff may show that he was capable of earning more than he was earning at the time of the injury, and the jury may consider what plaintiff might have been able to earn but for the injury in any employment for which he was fitted. *Jacobsen v. Poland* 590

10. For the purpose of deciding the amount of damages to be awarded for permanent impairment of earning capacity, evidence as to earnings of the plaintiff for a reasonable period before the injury may be received and considered. *Jacobsen v. Poland* 590

11. There is no definitive rule for determination in all cases what is a reasonable period as to evidence of earnings of plaintiff but this must be decided upon consideration of the circumstances of each case. *Jacobsen v. Poland* 590

12. Whether or not evidence of past earnings of plaintiff is too remote in time to be admissible is generally for the trial court to determine in the exercise of a sound discretion. *Jacobsen v. Poland* 590

13. Evidence of past earnings is competent not as furnishing an arbitrary measure of damages but as

assistance in enabling the jury to exercise a sound and just discretion in deciding the proper amount to be awarded for the impairment or loss of earning capacity. *Jacobsen v. Poland* 590

14. In an action for personal injury, plaintiff may recover all the damages proximately caused by the tort under a general allegation of the gross amount of the damages caused, including damages for impairment of his capacity to earn money. *Jacobsen v. Poland* 590

15. Rule for determination of present value of money payable in the future stated. *Jacobsen v. Poland* 590

16. The future pain and suffering which a jury is entitled to consider in the assessment of damages are such as the evidence shows with reasonable certainty will be experienced by the injured person. *Jacobsen v. Poland* 590

17. Where physical injuries and suffering therefrom have been proved but mental suffering has not been separately proved, it is not error for the court to instruct that mental suffering is an element which may be taken into consideration in arriving at the amount of damages recoverable. *Southwell v. DeBoer* 646

18. In an action for damages, where the law furnishes no legal rule for measuring them, the amount to be awarded rests largely in the sound discretion of the jury, and courts are reluctant to interfere with a verdict so rendered. *Southwell v. DeBoer* 646

19. Damages which are uncertain, conjectural, or speculative do not constitute the basis of a recovery. *Bitler v. Terri Lee, Inc.* 833

20. In order to recover substantial damages for breach of contract, plaintiff must furnish data sufficient to permit the court to determine with reasonable certainty the amount of the damages. *Bitler v. Terri Lee, Inc.* 833

21. Damages are recoverable for losses caused by breach of a contract only to the extent that the evidence affords a sufficient basis of ascertaining their amount in money with reasonable certainty. *Bitler v. Terri Lee, Inc.* 833

22. If damages are susceptible of reasonably accurate computation, the amount may not be left to conjecture. *Bitler v. Terri Lee, Inc.* 833

Declaratory Judgments.

1. The court in its discretion may refuse to render or

enter a declaratory judgment or decree when such judgment or decree would not terminate the uncertainty or controversy giving rise to the proceeding. *Haynes v. Anderson* 50

2. The statute which provides that when declaratory relief is sought, all persons shall be made parties who have or claim an interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding, is mandatory. *Haynes v. Anderson* 50

3. The statute authorizing a declaratory judgment is applicable only where all interested persons are made parties to the proceeding. *Haynes v. Anderson* 50

Phillips v. Phillips 282

Deeds.

1. Whether or not a deed is delivered ordinarily depends upon the intention of the grantor as determined from the facts and circumstances of each particular case. *Short v. Kleppinger* 729

2. No particular acts or words are necessary to constitute a delivery of a deed. Anything done by the grantor from which it is made to appear that a delivery was intended, whether by words or acts, or both, is sufficient. *Short v. Kleppinger* 729

3. The criterion upon which the question of delivery depends is whether or not the grantor intended the deed to operate as a muniment of title to take effect presently. *Short v. Kleppinger* 729

4. A conveyance once made cannot be changed by any subsequent act or statement which does not meet the requirements of law governing the conveyance or nonacceptance of property. *Short v. Kleppinger* 729

5. An attorney who prepared a deed at the request of the grantor and who was present at the time of its execution and delivery is competent to testify to factual matters concerning the preparation, execution, and delivery of the deed. *Short v. Kleppinger* 729

6. A provision in a will, made subsequent to the execution of a deed, indicating that the property involved had been conveyed, is a circumstance that properly may be considered with all the other facts and circumstances in determining whether or not there had been a delivery of the deed. *Short v. Kleppinger* 729

7. In a suit to set aside a conveyance of real property for want of mental capacity on the part of the grantor, the burden of proof is upon the party al-

leging it to establish that the mind of the grantor was so weak or unbalanced when the conveyance was executed that he could not understand and comprehend the purport and effect of what he was doing. *Johnson v. Mayfield* 872

Divorce.

1. Rule for consideration in Supreme Court of divorce cases stated. *Firebaugh v. Firebaugh* 79
2. The district court may at any time within 6 months of the trial and decision of a divorce case, if no appeal is taken therefrom, vacate or modify the decree therein. *Firebaugh v. Firebaugh* 79
3. The right to vacate or modify a decree of divorce within 6 months of the trial and decision of the cause is not absolute but must be exercised within a sound discretion. *Firebaugh v. Firebaugh* 79
4. In order that it may be said that the court exercised a sound judicial discretion in vacating or modifying a decree of divorce good reason therefor must be shown and it must also appear that such action did not produce an unconscionable result. *Firebaugh v. Firebaugh* 79
5. An appeal from a judgment modifying a decree of divorce is considered and decided by the Supreme Court de novo upon the record made in the trial court. *Bowman v. Bowman* 336
6. An alimony award, which is not a definite sum in gross, made in a decree of absolute divorce may be modified as to future installments upon adequate showing of changed circumstances since the decree was rendered. *Bowman v. Bowman* 336
7. A material change in the condition of the parties since the rendition of the decree of divorce is a prerequisite to a modification of the decree. *Bowman v. Bowman* 336
8. A provision for termination of alimony upon remarriage of the recipient contemplates and requires a valid remarriage. *Bowman v. Bowman* 336
9. If a decree of absolute divorce awards alimony, the subsequent improper conduct, however gross, of the woman is no cause for discharging the former husband from such alimony. *Bowman v. Bowman* 336
10. The fixing of the amount of alimony rests, in each case, upon the sound discretion of the court. *Malone Malone* 517
11. Even though the cross-petition of a wife is denied

and an absolute divorce granted the husband, the wife may be granted reasonable alimony within the limitations prescribed by statute. *Malone v. Malone* 517

12. Rule for determination of alimony in divorce case stated. *Malone v. Malone* 517

13. The fee allowed for the service of an attorney for a woman in a divorce action should be sufficient to adequately compensate for the service necessary to be performed. *Malone v. Malone* 517

14. Jurisdiction of the court in matters relating to divorce and alimony is given by the statute. Every power exercised by the court with reference thereto must look for its source in the statute or it does not exist. *Timmerman v. Timmerman* 704

15. An allowance of attorney's fees in an action for divorce is dependent upon the existence of the marriage relation. *Timmerman v. Timmerman* 704

16. In a divorce action wherein a divorce has been granted and the custody of children has been fixed, the court in a proper proceeding may, where the circumstances of the parties have changed or it shall be to the best interests of the children, modify the decree as it concerns the care, custody, and maintenance of the children or any of them. *Anderson v. Wilcox* 883

17. Custody of minor children awarded to their mother in a divorce action will not be disturbed in a subsequent proceeding to modify the original decree, unless by changed circumstances it is affirmatively shown that the mother is an unfit person to have their custody, or that the best interests of the children require such action. *Anderson v. Wilcox* 883

Easements.

Definition of an easement is given. *Elsasser v. Szymanski* 65

Elections.

1. A filing for nomination for the office of judge of the district court by a candidate not the holder of another and different elective office was required to be made not less than 40 days before the primary election. *Fitzgerald v. Kuppinger* 286

2. A filing for nomination for the office of judge of the district court by a candidate who was the holder of another and different elective office was required

to be made not less than 50 days before the primary election. *Fitzgerald v. Kuppinger* 286

Eminent Domain.

1. The powers and duties of a county judge in a condemnation proceeding are not judicial but are purely ministerial. *Lane v. Burt County Rural Public Power Dist.* 1
2. A condemnation proceeding becomes a judicial proceeding on appeal to the district court. Proper pleadings are necessary in the district court to present other issues. *Lane v. Burt County Rural Public Power Dist.* 1
3. Jurisdiction of an eminent domain proceeding cannot ordinarily be conferred on an appellate court by consent, waiver, or estoppel. However, a party may be estopped to deny the existence of facts upon which jurisdiction thereof depends. *Lane v. Burt County Rural Public Power Dist.* 1
4. In eminent domain proceedings, evidence as to the value of the land taken and damaged must be based upon its value in the condition in which it was at the time of the condemnation, which is the date of the filing of the petition therefor. *Lane v. Burt County Rural Public Power Dist.* 1
5. In a condemnation action, the proper procedure is for the court to reserve the question of interest for its determination and direct the jury not to include it in its verdict. *Lane v. Burt County Rural Public Power Dist.* 1

Equity.

1. Independently of any limitation for the guidance of courts of law, equity may, in the exercise of its own inherent powers, refuse relief because of laches where it is sought after undue and unexplained delay, and when injustice would be done in the particular case by granting the relief asked. *Dewey v. Dewey* 296
2. Laches does not grow out of the mere passage of time. It is founded upon the inequity of enforcing a claim where there has been a change in the condition or relations of the property or parties. *Dewey v. Dewey* 296

Estoppel.

1. "Estoppel" means the preclusion of a person from asserting a fact, by previous conduct inconsistent

therewith, on his own part or the part of those under whom he claims, or by an adjudication upon his rights which he cannot be allowed to call in question. *State v. Nielsen* 372

2. To constitute an estoppel, a party must have been guilty of such conduct as to have given the person pleading the estoppel reason to believe that a state of facts existed inconsistent with those now asserted against him and in reliance on which he acted. *State v. Nielsen* 372

3. When a person knowing his rights takes no steps to enforce them until the condition of the other party has, in good faith, become so changed that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable and operates as an estoppel against the assertion of the right. *State v. Nielsen* 372

4. The creation of an estoppel requires that the party against whom it is claimed acted with knowledge of his rights. The party claiming the estoppel must be without knowledge of the facts on which he bases his claim of estoppel; that he was influenced by and relied on the conduct of the other person; and that he changed his position in reliance thereon to his injury. *Hafeman v. Gem Oil Co.* 438

5. A plea of estoppel in pais may be joined with a general denial when the averments by way of estoppel are not inconsistent with such denial. *Giacomini v. Giacomini* 798

6. An executor or administrator, who receives and takes possession of property in his representative fiduciary capacity, is generally estopped in a collateral action to deny the title of his decedent or to set up an adverse title to the injury of those beneficially interested in the estate. *Giacomini v. Giacomini* 798

Evidence.

1. In eminent domain proceedings, evidence as to the value of the land taken and damaged must be based upon its value in the condition in which it was at the time of the condemnation, which is the date of filing the petition therefor. *Lane v. Burt County Rural Public Power Dist.* 1

2. Statute providing for requests for admission of evidence is not merely directory, but substantial compliance therewith is required. However, the party claiming admissions for failure to deny must

prove service of a proper request in compliance therewith and failure to appropriately respond thereto. *Kissinger v. School District No. 49* 33

3. Where a party properly serves a request for admissions of relevant matters of fact, the failure to make a proper response within the time allotted constitutes an admission of the facts sought to be elicited. *Kissinger v. School District No. 49* 33

4. When a request for admissions is properly made, the party served must answer even though he has no personal knowledge, if the means of obtaining the information is available to him. *Kissinger v. School District No. 49* 33

5. It is not proper to refuse to respond to a requested admission on the ground that the requesting party has the burden of proving the matters contained in the request, or that the matters requested to be admitted are controverted by the pleadings. *Kissinger v. School District No. 49* 33

6. In a proper request for admissions an improper response is treated as no response at all and hence as an admission. *Kissinger v. School District No. 49* 33

7. A photograph proved to be a true representation of the person, place, or thing which it purports to represent is proper evidence of anything of which it is competent and relevant for a witness to give a verbal description. *Brockman v. State* 171

8. When appropriate foundation is laid, X-ray pictures are admissible in evidence and subject to interpretation by an expert witness for the purpose of showing the condition of the internal tissues of the body. *Fries v. Goldsby* 424

9. Generally, in order to predicate error upon a ruling of the court refusing to permit a witness to testify or to answer a specific question, the record must show an offer to prove the facts sought to be elicited. However, when the condition of the record and the form of the question itself show that it is relevant, material, and competent, no offer of proof is necessary. *Fries v. Goldsby* 424

10. For the purpose of deciding the amount of damages to be awarded for permanent impairment of earning capacity, evidence as to earnings of the plaintiff for a reasonable period before the injury may be received and considered. *Jacobsen v. Poland* 590

11. There is no definitive rule for determination in all cases what is a reasonable period as to evidence of

earnings of plaintiff but this must be decided upon consideration of the circumstances of each case. *Jacobsen v. Poland* 590

12. Whether or not evidence of past earnings of plaintiff is too remote in time to be admissible is generally for the trial court to determine in the exercise of a sound discretion. *Jacobsen v. Poland* 590

13. Evidence of past earnings is competent not as furnishing an arbitrary measure of damages but as assistance in enabling the jury to exercise a sound and just discretion in deciding the proper amount to be awarded for the impairment or loss of earning capacity. *Jacobsen v. Poland* 590

14. Rule for determination of present value of money payable in the future stated. *Jacobsen v. Poland* 590

15. While a voluntary confession is insufficient, standing alone, to prove that a crime has been committed, it is, nevertheless, competent evidence of that fact, and may, with slight corroborative circumstances, establish the corpus delicti as well as the defendant's guilty participation. *Cotner v. Solomon* 619

16. The record of a court in which a cause originated or was tried, when properly authenticated, imports verity and cannot be impeached, varied, or changed by oral testimony or extrinsic evidence. *Peterson v. State* 669

17. Evidence of the readings of radar equipment designed to determine the speed of moving vehicles is admissible as evidence of speed if a sufficient foundation is laid as to the accuracy of the equipment in operation. *Peterson v. State* 669

18. The testimony of an officer as to the speedometer reading of a car driven by him at a given time is competent prima facie evidence of the speed of the car at the time. Evidence as to the accuracy of the speedometer is not required as a foundation to that evidence. *Peterson v. State* 669

19. If the existence of a written contract has been induced by prior or contemporaneous oral agreement, parol evidence is not admissible to add to or contradict terms of the written contract. *Bitler v. Terri Lee, Inc.* 833

20. In the absence of fraud, mistake, or ambiguity, where negotiations between the parties result in an agreement that is reduced to writing, the only competent evidence of the contract is the writing itself. *Bitler v. Terri Lee, Inc.* 833

Executors and Administrators.

An executor or administrator, who receives and takes possession of property in his representative fiduciary capacity, is generally estopped in a collateral action to deny the title of his decedent or to set up an adverse title to the injury of those beneficially interested in the estate. *Giacomini v. Giacomini* 798

Food.

A restaurant owner engaged in serving food to paying guests for immediate consumption on the premises impliedly warrants that the food so served is wholesome and fit for human consumption. He is liable for injuries to such guests proximately caused by a breach thereof without proof of negligence. *Zorinsky v. American Legion* 212

Forcible Entry and Detainer.

1. County courts have jurisdiction of actions for the forcible entry and detainer of real estate. *Jones v. Schmidt* 508
2. District courts have no original jurisdiction of cases in forcible detainer. The jurisdiction of district courts in such actions is acquired by appeal or error proceedings. *Jones v. Schmidt* 508
3. The action is merely possessory, and the question of title to real estate cannot be either tried or determined in such case. *Jones v. Schmidt* 508
4. An equitable title to real estate and possession thereof may be shown as a defense in an action of forcible entry and detainer. A justice of the peace or a county judge has no jurisdiction to try such a title. *Jones v. Schmidt* 508
5. Where the title to land, which is sought to be recovered in a forcible detainer case, is drawn in question and evidence thereon is submitted in the county court, the district court, on appeal therefrom, is without jurisdiction to hear and to determine the controversy. In such case, the action stands for dismissal. *Jones v. Schmidt* 508

Frauds, Statute of.

1. It is the general rule that the memorandum in writing required by the statute of frauds must refer to the essential terms of the oral contract entered into by the parties. *Ord v. Benson* 367
2. The time of delivery of the goods and the time of

payment, if agreed upon in the oral contract, must be referred to in the memorandum in writing required by the statute of frauds. *Ord v. Benson* 367

3. Where time of delivery of the goods and the time of their payment are not referred to in the oral agreement, the memorandum in writing required by the statute is sufficient without reference to such missing terms since the law implies the time of delivery and payment under the terms of the oral agreement and the memorandum as well. *Ord v. Benson* 367

Habeas Corpus.

1. Surplusage in designation of plaintiff in habeas corpus proceeding did not have the effect of changing the issues or parties to the appeal. *State ex rel. Miller v. Cavett* 584
2. In an appeal to the district court from an order discharging the relator in a habeas corpus proceeding, the relator assumes the position of plaintiff and the respondent that of the defendant. *State ex rel. Miller v. Cavett* 584
3. In an appeal to the district court in a habeas corpus proceeding, it is not required that a writ be issued by the district court. Jurisdiction over the parties obtains by virtue of the appeal. *State ex rel. Miller v. Cavett* 584
4. The sufficiency of evidence adduced at a preliminary examination to hold an accused to answer for a crime with which he is charged may be raised and tried in habeas corpus proceedings. *Cotner v. Solomon* 619
5. In a habeas corpus proceeding instituted for the purpose of testing the sufficiency of evidence taken at a preliminary examination to require a person to be tried on a criminal charge, the court will not weigh the evidence but will only inquire as to the existence of evidence to sustain the charge. *Cotner v. Solomon* 619

Highways.

1. At common law it was the duty of the county to build and maintain highway bridges; but if the highway was crossed or disturbed for any purpose by other than highway authorities, it was the obligation of the one interfering with the road to restore it. *Platte Valley P. P. & I. Dist. v. County of Lincoln* 196
2. A county cannot be obligated to maintain a bridge

constructed across a ditch of a public irrigation district which intersects a county public highway unless the governing board of the district, before any construction work is done on the bridge, attempts in good faith to negotiate and agree with the county board for the building and maintenance of the bridge and the approaches thereto. *Platte Valley P. P. & I. Dist. v. County of Lincoln* 196

3. Obligation of public irrigation district and county in construction and maintenance of bridge on highway stated. *Platte Valley P. P. & I. Dist. v. County of Lincoln* 196

4. A motorist about to enter a highway protected by stop signs must stop as directed, look in both directions, and permit all vehicles to pass which are at such a distance and traveling at such a speed that it would be imprudent to proceed into the intersection. *Paddack v. Patrick* 355

5. Where a motorist on a nonfavored street stops at an intersecting arterial highway when the intersection is clear of traffic, looks to the right and left for approaching vehicles, acting as a reasonably prudent person in the exercise of due care would act in the belief that he has time and opportunity to safely cross, he is not liable for negligence merely because he attempts to do so. *Paddack v. Patrick* 355

6. A motorist, upon entering an intersection, does not have an absolute right-of-way which permits him to proceed without looking but must continue to maintain a proper lookout for the safety of himself and others traveling upon the streets. *Paddack v. Patrick* 355

7. Where a motorist approaching a through street or highway stops, looks, and sees an approaching vehicle on the favored street or highway but erroneously judges its speed or distance or for some other reason assumes he can proceed with safety and not have a collision, the question of whether or not his conduct in doing so makes him guilty of contributory negligence is usually one for the jury. *Paddack v. Patrick* 355

8. A person traveling a favored street protected by a traffic signal, of which he has knowledge, may properly assume that oncoming traffic will obey it. *Paddack v. Patrick* 355

9. A user of the highways may assume, unless and until he has warning, notice, or knowledge to the contrary, that other users of the highways will use

them in a lawful manner, and until he has such warning, notice, or knowledge, he is entitled to govern his actions in accordance with such assumption. *Paddack v. Patrick* 355

10. The rules of the road fixed by statute extend to all public highways, however created, and to all roads not public highways, if used for travel by the public. *Bresley v. O'Connor Inc.* 565

11. Where construction work on a highway has been completed and, although not officially opened to public travel, is being used by the general public, the highway is a public highway, and the statutory rules of the road are applicable thereto. *Bresley v. O'Connor Inc.* 565

12. Duties and obligations of a motorist entering an intersection of two streets or highways stated. *Maska v. Stoll* 857

13. Right-of-way rule applicable where two motorists approach an intersection at or about the same time stated. *Maska v. Stoll* 857

Homicide.

1. Manslaughter is a crime of violence. On conviction of this crime the imposition of an indeterminate sentence by the trial court is erroneous. *Edmonds v. State* 323

2. An indeterminate sentence imposed in the case of a conviction for manslaughter, although erroneous, does not entitle the party convicted to a new trial. The proper procedure is to remand the cause to the district court for the imposition of a proper sentence. *Edmonds v. State* 323

Injunctions.

1. A resident taxpayer of the state, without showing any interest or injury peculiar to himself, may enjoin illegal expenditures by a public board or officer. *Haynes v. Anderson* 50

2. If a county assessor fails to make an inspection of real estate and relies upon and accepts for assessment purposes the valuation of an appraiser, the assessment is not void and no ground is afforded for injunctive relief. *Boettcher v. County of Holt* 231

3. Where the complaint of a taxpayer is based upon irregularities as distinguished from incidents rendering the tax void, the remedy of the taxpayer is not by injunction but by resort in the first instance to

the board of equalization. *Boettcher v. County of Holt* 231
4. Evidence was sufficient to sustain the granting of a permanent injunction. *State v. Nielsen* 372

Interest.
1. In a condemnation action, the proper procedure is for the court to reserve the question of interest for its determination and direct the jury not to include it in its verdict. *Lane v. Burt County Rural Public Power Dist.* 1
2. Recovery of interest on an unliquidated claim, the subject of reasonable controversy, and incapable of being fixed by computation, may be had only from the date of the judgment. *Colvin v. Powell & Co., Inc.* 112

Intoxicating Liquors.
The distance required by statute between a church and a place where it is proposed to sell intoxicating liquor at retail should be determined by measuring in a straight line between the nearest walls of the two buildings. *Calvary Baptist Church v. Coonrad* 25

Judges.
The judges of the several district courts, as such, have no inherent authority at chambers whatever, but only such as the statutes give to them. *Mueller v. Keeley* 613
Vasa v. Vasa 642

Judgments.
1. In order to obtain a summary judgment the movant must show (1) that there is no genuine issue as to any material fact in the case, and (2) that he is entitled to a judgment as a matter of law. *Kissinger v. School District No. 49* 33
2. The summary judgment is effective and serves a useful purpose only when it can be used to pierce allegations in the pleadings and show that the material facts are undisputed and otherwise than as alleged. *Kissinger v. School District No. 49* 33
3. Where the answers to a proper request for admissions show that the facts are undisputed and the movant is entitled to a judgment as a matter of law, a motion for summary judgment affords a proper remedy. *Kissinger v. School District No. 49* 33

4. A motion to dismiss is not the proper mode of raising the defense of a former adjudication. *Schroeder v. Homestead Corp.* 43
5. A litigant, relying upon the doctrine of res judicata involved in a pending case, bears the burden of introducing evidence to prove such defense. *Schroeder v. Homestead Corp.* 43
6. Judicial notice will not be taken of a judgment in another suit as res judicata when not pleaded or given in evidence. *Schroeder v. Homestead Corp.* 43
7. Where the excessive amount in a judgment is subject to exact determination, a remittitur may be required as a condition of affirmance for the correct amount. *Colvin v. Powell & Co., Inc.* 112
8. Where parties to an action have voluntarily complied with the order of the court, the judgment is thereby satisfied and its force exhausted. After a judgment has thus been satisfied there is nothing left of which such parties can thereafter complain or about which they can say they are still aggrieved. *School Dist. No. 65 v. McQuiston* 246
9. Material facts or questions which were in issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment therein. Such facts or questions become res judicata and may not again be litigated in a subsequent action. *Gable v. Pathfinder Irr. Dist.* 349
10. A party relying upon the doctrine of res judicata bears the burden of introducing evidence to prove that an issue was involved and actually determined in a prior action. *State ex rel. Weasmer v. Manpower of Omaha, Inc.* 529
11. Judicial notice will not be taken of a judgment in another suit as res judicata, whether in the same court or another court, when not pleaded or given in evidence. *State ex rel. Weasmer v. Manpower of Omaha, Inc.* 529
12. Extent of doctrine of res judicata stated. *State ex rel. Weasmer v. Manpower of Omaha, Inc.* 529
13. A judgment will not operate as res judicata unless it appears on the face of the record, or is shown by extrinsic evidence, that the precise question was raised and determined in the former suit. *State ex rel. Weasmer v. Manpower of Omaha, Inc.* 529
14. Whether a former judgment is a bar to an action ordinarily depends on whether the same evidence will sustain both the present and the former action, and

whether it appears that different proof is required, a judgment in one of them is no bar to the other. *State ex rel. Weasmer v. Manpower of Omaha, Inc.* 529

15. An order of the trial court overruling or sustaining a motion for a new trial must be made with the same solemnity as a judgment. It is the order which gives finality to the judgment. It goes to the determination of a substantial right of the party. *Mueller v. Keeley* 613

16. The record of a court in which a cause originated or was tried, when properly authenticated, imports verity and cannot be impeached, varied, or changed by oral testimony or extrinsic evidence. *Peterson v. State* 669

Juries.

1. Action of trial court in sending jurors back to jury room for further deliberation did not amount to coercion or an attempt to influence their verdict under circumstances stated. *Brockman v. State* 171

2. Unless otherwise provided by statute, one charged with a statutory misdemeanor has the right to demand a trial by jury in the county where the offense is alleged to have been committed but may waive his right thereto. *Sutton v. State* 524
Peterson v. State 669

3. Where the right of trial by jury has been voluntarily waived by the accused, he thereafter has no right or power at his mere will to withdraw or revoke his waiver and demand a jury trial. *Sutton v. State* 524

4. Whether one accused of crime who has regularly waived a jury trial will be permitted to withdraw the waiver and have his case tried before a jury is ordinarily within the discretion of the trial court. *Sutton v. State* 524

Limitations of Actions.

1. The accrual of a cause of action means the right to maintain and institute a suit. Whenever one person may sue another, a cause of action has accrued and the statute begins to run, but not until that time. *Dewey v. Dewey* 296

2. Laches and the statute of limitations will generally begin to run between a trustee and beneficiary of an express or voluntary trust when the trust terminates by its own limitations or the trustee repudi-

ates the trust by the assertion of an adverse claim to or ownership of the trust property. *Dewey v. Dewey* 296

3. Repudiation of a trust may be proved either by actual knowledge by or notice thereof to the beneficiary, or by open, notorious, and unequivocal facts and circumstances from which a beneficiary who is not under any recognized disability would be put on notice that the trust has been repudiated and require him to timely assert his equitable rights. *Dewey v. Dewey* 296

4. Whether or not such facts and circumstances are consistent with continuance of the trust or indicate an intent to repudiate and claim adversely is a question of fact for determination by the court in each individual case. *Dewey v. Dewey* 296

5. By statute, an action for the recovery of the title or possession of lands, tenements, or hereditaments can only be brought within 10 years after the cause of action shall have accrued. *State v. Nielsen* 372

6. Generally, an answer setting up the statute of limitations and laches is not a technical plea of confession and avoidance. Whether an answer of a supposed estoppel is so or not depends upon the nature of the matter alleged in the plea. *Giacomini v. Giacomini* 798

Marriage.

1. The making of a common-law marriage in this state is prohibited by statute, which prohibition was enacted in 1923. *Bowman v. Bowman* 336

2. A provision for termination of alimony upon remarriage of the recipient contemplates and requires a valid remarriage. *Bowman v. Bowman* 336

3. An indispensable requisite of a common-law marriage is a mutual agreement presently to become man and wife by persons qualified under the law to make such a compact and it must contemplate a permanent marital relationship of the parties to the exclusion of all others. *Bowman v. Bowman* 336

4. A requirement of a common-law marriage is that the parties must hold themselves out as husband and wife in the community where they reside. *Bowman v. Bowman* 336

Master and Servant.

A person is liable for the negligent operation of an

automobile by his servant or agent only where such servant or agent, at the time of the accident, was engaged in his employer's or principal's business with his knowledge and direction. *Pospichal v. Wiley* 236

Mines and Minerals.

1. If the signers of a division order are cotenants of the oil, they do not thereby contract with each other. A signer of a division order admits that he owns the amount of oil set apart to him therein but expresses no intention to convey or transfer any oil to any other person. *Hafeman v. Gem Oil Co.* 438
2. The signer of a division order with respect to oil rights is generally not estopped from asserting his rights against his cotenants who are not entitled to the royalties which were paid to them. *Hafeman v. Gem Oil Co.* 438
3. If a tract of land upon which an oil and gas lease has been given is subsequently divided into different ownerships, the owners of separate mineral interests are only entitled, in the absence of specific agreement to the contrary, to royalties accruing from production on the particular tract to which their ownership attached, but this does not preclude inclusion of an entirety clause. *Hafeman v. Gem Oil Co.* 438
4. An entirety clause in an oil and gas lease constitutes a restriction on the right of the lessor, for the duration of the lease, to alienate his mineral interests in the leased premises contrary to its provisions. *Hafeman v. Gem Oil Co.* 438
5. A tenant in common of oil underlying land which has been extracted by a cotenant is entitled to an accounting from the cotenant who produced the oil for the value of the ownership of the tenant in common in the oil. *Hafeman v. Gem Oil Co.* 438
6. A covenant in an oil and gas lease to pay rent or royalties is not personal or collateral but runs with the land. *Hafeman v. Gem Oil Co.* 438
7. One who acquires by assignment the entire interest of the lessee in a distinct part of the leased land is as to such part in privity with the lessor and liable to him for rent for or royalty from that part. *Hafeman v. Gem Oil Co.* 438
8. The assignment of an oil and gas lease by the lessee divests him of a privity of estate and transfers

it to his assignee who thereafter holds in privity of estate with the lessor. *Hafeman v. Gem Oil Co.* 438

9. The assignee of a lease for oil and gas production who acquires all the estate of the lessee is liable to the lessor for the payment of rent or royalties which accrue while he holds an assignment of the lease; and this is likewise true as to any subsequent assignee of the lease. *Hafeman v. Gem Oil Co.* 438

10. Implicit in an obligation to pay royalties is the duty to pay the correct amount to the rightful owner. *Hafeman v. Gem Oil Co.* 438

11. An assignee of an oil and gas lease is obligated to perform a covenant of the lease for the payment of royalties to the lessor to the extent of his ownership of them if the lease by its terms extends the obligation to the assignee. *Hafeman v. Gem Oil Co.* 438

12. By statute, the governing board of a city is authorized and empowered to lease lands under its control for oil and gas exploration and development. *Belgum v. City of Kimball* 774

13. By statute, the governing board of a city is authorized in its discretion to enter into agreements for the pooling of acreage, or any part of the acreage, covered by leases granted for the production of oil and gas, and to provide for the apportionment of oil and gas royalties on a proportionate acreage basis. *Belgum v. City of Kimball* 774

14. Cities and towns in producing areas are authorized to enact ordinances limiting the number of oil wells that may be drilled within defined areas, requiring pooling of small tracts, and requiring permits to drill within the corporate limits. *Belgum v. City of Kimball* 774

15. The term "mineral" ordinarily embraces oil, petroleum, and natural gas. *Belgum v. City of Kimball* 774

16. Where the fee to streets and alleys, and not merely an easement therein, is vested in the municipality, it owns the minerals under the surface of the streets and alleys. The adjoining lot owners have no right, title, or interest in said minerals until such streets and alleys are vacated by the municipality. *Belgum v. City of Kimball* 774

Motor Carriers.

1. In a dispute between a shipper and a common carrier as to a tariff rate fixed by the State Railway Commission, an application by the shipper to the com-

mission to determine the proper rate empowers the commission to determine the dispute. *Mefford v. Wilson Concrete Co.* 137

2. In a dispute between a shipper and a common carrier as to a tariff rate fixed by the State Railway Commission, an application by the carrier to the commission to determine the proper rate does not under the powers granted to the commission empower it to determine the dispute. *Mefford v. Wilson Concrete Co.* 137

3. A dispute between a shipper and a common carrier as to a tariff rate fixed by the State Railway Commission is determinable by the courts unless the shipper has invoked the power of the commission to make the determination. *Mefford v. Wilson Concrete Co.* 137

Municipal Corporations.

1. The Legislature may classify counties and cities when such classification rests upon some difference of situation or circumstance which calls for distinctive legislation for the class. The class must have a substantial quality or attribute which requires legislation appropriate or necessary for the counties and cities in the class and which would be inappropriate or unnecessary for those without the class. *Omaha Parking Authority v. City of Omaha* 97

2. A provision of a home rule charter takes precedence over a conflicting state statute in instances of local municipal concern. A state law affecting municipal affairs which is of state-wide concern takes precedence over any municipal action under a home rule charter. *Omaha Parking Authority v. City of Omaha* 97

3. The alleviation of congested streets and highways in a city of the metropolitan class by subway and off-street parking is a matter of state concern and not a matter of exclusive local concern. *Omaha Parking Authority v. City of Omaha* 97

4. The providing of subway and off-street parking in metropolitan cities is a public function and the facilities provided are for a public use. *Omaha Parking Authority v. City of Omaha* 97

5. The property of a city used in carrying out its governmental as distinguished from is proprietary functions is likewise subject to the control of the state. *Omaha Parking Authority v. City of Omaha* 97

6. The lease of public property to a private person may serve a public purpose. An act of the Legislature authorizing such a lease must provide controls for the manner and method of operation to insure its operation for the public good. *Omaha Parking Authority v. City of Omaha* 97
7. A supervisory control of prices to be charged is necessary to a proper leasing of parking facilities under the Parking Authority Law. *Omaha Parking Authority v. City of Omaha* 97
8. A city is not liable to an adjacent property owner for consequential damages occasioned by a diminution in value of his property caused by the removal of trees growing in the street in order to place a sidewalk therein. *Weibel v. City of Beatrice* 183
9. Damages for the removal of trees in a public street are not within the recoverable damages provided for in Article I, section 21, of the Constitution of Nebraska. *Weibel v. City of Beatrice* 183
10. The legislative power and authority delegated to a city to construct local improvements and levy assessments for payment thereof is to be strictly construed, and every reasonable doubt as to the extent or limitation of such power and authority is resolved against the city and in favor of the taxpayer. *Chicago, St. P., M. & O. Ry. Co. v. City of Randolph* 687
11. The streets of a city of the second class or village can be paved and so paid for only by legally following one of the three factually applicable methods provided by statute. *Chicago, St. P., M. & O. Ry. Co. v. City of Randolph* 687
12. The power of a city council to make paving improvements is circumscribed by the statute, and unless the city council conforms to one of the three prescribed methods, it is without power to lawfully bind property to pay for such improvements. *Chicago, St. P., M. & O. Ry. Co. v. City of Randolph* 687
13. The methods prescribed by statute granting to cities of the second class and villages power to pave, gravel, and improve streets are mandatory and jurisdictional, and unless the governing boards of such municipalities act within one of the three prescribed methods, no valid assessment can be made against property to pay the costs of such improvement. *Chicago, St. P., M & O. Ry. Co. v. City of Randolph* 687

14. The publications and notices provided by statute are mandatory and jurisdictional steps without which an ordinance never becomes effective. *Chicago, St. P., M. & O. Ry. Co. v. City of Randolph* 687
15. If the applicable law prescribes the mode of exercising the power, the mode prescribed must be followed or the assessment will be void. *Chicago, St. P., M. & O. Ry. Co. v. City of Randolph* 687
16. Special assessments made upon property without compliance with jurisdictional requirements are void as distinguished from irregular. *Chicago, St. P., M. & O. Ry. Co. v. City of Randolph* 687
17. Special improvements cannot be ordered except in the manner provided by statute. *Chicago, St. P., M. & O. Ry. Co. v. City of Randolph* 687
18. The power to construct improvements and levy assessments for benefits is a power limited to and must be exercised within the district created. *Chicago, St. P., M. & O. Ry. Co. v. City of Randolph* 687
19. When a party attacks a paving assessment for the reason that it is illegal or for an unauthorized purpose, the burden is on him to prove the invalidity of the assessment or that it was for an unauthorized purpose. *Chicago, St. P., M. & O. Ry. Co. v. City of Randolph* 687
20. The power vested in the Legislature to create a municipal corporation implies the power to create it with such limitations as that body may see fit to impose, and to impose such limitations at any stage of its existence. *Belgum v. City of Kimball* 774
21. By statute, the governing board of a city is authorzied and empowerd to lease lands under its control for oil and gas exploration and development. *Belgum v. City of Kimball* 774
22. By statute, the governing board of a city is authorized in its discretion to enter into agreements for the pooling of acreage, or any part of the acreage, covered by leases granted for the production of oil and gas, and to provide for the apportionment of oil and gas royalties on a proportionate acreage basis. *Belgum v. City of Kimball* 774
23. Cities and towns in producing areas are authorized to enact ordinances limiting the number of oil wells that may be drilled within defined areas, requiring pooling of small tracts, and requiring permits to drill within the corporate limits. *Belgum v. City of Kimball* 774

24. At common law the dedication of a street or alley passed to the municipality merely an easement. The dedicator still continued to own the fee, subject to the easement. A deed of an abutting lot passed the title to the center of the street, or included the entire street as the case might be, burdened, of course with the easement. *Belgum v. City of Kimall* 774
25. The Legislature may alter common-law rules of conveyancing, and thus has the power to prescribe the legal effect of voluntary dedication of streets and alleys to a municipality. *Belgum v. City of Kimball* 774
26. By statute, the acknowledgment and recording of a plat, laying out into lots and blocks and showing thereon the streets and alleys, operates as a dedication which is equivalent to a deed in fee simple to such portions of the premises platted as is on such plat set apart for streets and alleys for public use to the municipality. *Belgum v. City of Kimball* 774
27. By statute, whenever any avenue, street, alley, or lane is vacated, the same reverts to the owners of adjacent real estate, one-half on each side thereof. *Belgum v. City of Kimball* 774
28. A plat made and recorded in statutory form since the enactment of sections 17-417 and 17-558, R. R. S. 1943, is subject to the provisions of both sections which must be considered in pari materia. *Belgum v. City of Kimball* 774
29. While the equivalent to a deed in fee simple to the streets and alleys on a plat is vested in a municipality by statute, such fee is a qualified, base, or determinable fee which may be continued forever if the streets and alleys be devoted to the public use. Such fee is determined by the vacation of streets and alleys by the municipality. *Belgum v. City of Kimball* 774
30. Where the fee to streets and alleys, and not merely an easement therein, is vested in the municipality, it owns the minerals under the surface of the streets and alleys. The adjoining lot owners have no right, title, or interest in said minerals until such streets and alleys are vacated by the municipality. *Belgum v. City of Kimball* 774
31. A city of the first class, under the police power delegated to it by statute, may by ordinance employ parking meters to aid in the control and regulation of public streets if the ordinance is not arbitrary,

oppressive, or discriminatory, and is reasonably calculated to accomplish the purposes of regulation. *School District of McCook v. City of McCook* 817

32. If an ordinance purporting to be a police regulation is in fact a revenue measure, it is unconstitutional for the reason that it lacks the element of uniformity necessary to the validity of revenue enactments. A revenue tax may not be imposed under the guise of a police regulation. *School District of McCook v. City of McCook* 817

33. The placing of a coin in a parking meter is not the payment of a toll or rental for the use of the parking space designated in a street. It is a regulatory device designed to discourage and prevent overtime parking and thereby expedite the free movement of traffic, the avoidance of congestion on the streets, and the abuse of parking privileges. *School District of McCook v. City of McCook* 817

34. The collection of money by a city, under an ordinance permitting its payment in a fixed amount within a specified time to avoid prosecution for the violation of a regulatory ordinance under the police power, is a penalty within the meaning of Article VII, section 5, of the Constitution. *School District of McCook v. City of McCook* 817

35. Moneys collected for overtime parking are punitive in character, and not remedial or compensatory to the city, and as such are penalties arising under the rules, by-laws, and ordinances of cities as provided in Article VII, section 5, of the Constitution. *School District of McCook v. City of McCook* 817

36. Article VII, section 5, of the Constitution, is a self-executing provision and funds within its provisions do not lose their character by being otherwise designated in an ordinance of a city. *School District of McCook v. City of McCook* 817

37. When a statute or a city ordinance is ambiguous or susceptible of two constructions, one of which creates absurdities, unreasonableness, or unequal operation, and the other of which avoids such a result, the latter should be adopted. *Maska v. Stoll* 857

Negligence.

1. Where different minds may reasonably draw different conclusions from the evidence, or where there is a conflict in the evidence as to whether or not negli-

gence or contributory negligence has been established, the question is for the jury. *Dryer v. Malm* 72
Pospichal v. Wiley 236

2. Proximate cause is that cause which in a natural sequence, unbroken by any efficient intervening cause, produces the injury, and without which the accident could not have happened. *Dryer v. Malm* 72

3. As a general rule it is negligence as a matter of law for a motorist to drive an automobile on a highway in such a manner that he cannot stop in time to avoid a collision with an object within the range of his vision. *Dryer v. Malm* 72

4. Exceptions to the general rule are situations where on streets or highways the nature of the object or its condition or color in relation to the street or highway may be such as to affect immediate visibility. *Dryer v. Malm* 72

5. Exceptions do not extend to that which is clearly seen or in the exercise of ordinary care would or should have been seen. *Dryer v. Malm* 72

6. The sudden emergency rule cannot be invoked by a party unless there is competent evidence to support a conclusion that a sudden emergency actually existed, unless the party invoking it has not brought the emergency on by his own act, and unless he has used due care to avoid it. *Dryer v. Malm* 72

7. In a negligence case, where different minds may reasonably draw different conclusions or inferences from the evidence adduced, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury. *Colvin v. Powell & Co., Inc.* 112

8. A party is only answerable for the natural, probable, reasonable, and proximate consequences of his acts. Where some new efficient cause intervenes and produces the injury, it is the dominant cause. *Colvin v. Powell & Co., Inc.* 112

9. If the original negligence is of a character which is liable to invite or induce the intervention of some subsequent cause, the intervening cause will not excuse it and the subsequent mischief will be held to be the result of the original negligence. *Colvin v. Powell & Co., Inc.* 112

10. If successive instruments or a series of events are combined in one continuous chain or train through which the force of the cause operated to produce the disaster, they may be the proximate cause of an injury. *Colvin v. Powell & Co., Inc.* 112

11. Liability of person who knew or should have known of danger from leaving of poisonous substance on premises stated. *Colvin v. Powell & Co., Inc.* 112
12. A manufacturer or other person owning or controlling a thing that is dangerous in its nature or is in dangerous condition owes a legal duty to persons ignorant of the danger to use reasonable care to prevent injury. *Colvin v. Powell & Co., Inc.* 112
13. It is immaterial whether or not the conduct of the seller of a dangerous substance amounted to a breach of contract between him and the immediate buyer from him. The duty is not created by contract, but is an instance of the general human duty not to injure another through disregard of his safety. *Colvin v. Powell & Co., Inc.* 112
14. Measure of damages in negligence case, and duty of mitigating damages, stated. *Colvin v. Powell & Co., Inc.* 112
15. Gross negligence means great and excessive negligence, that is, negligence in a very high degree. It indicates the absence of slight care in the performance of a duty. *Kiser v. Christensen* 155
16. Where a driver of an automobile is suddenly confronted with an emergency requiring instant decision, he is not necessarily guilty of negligence in pursuing a course which mature reflection or deliberate judgment might prove to be wrong. *Kiser v. Christensen* 155
17. A warning of imminent danger to a host by a guest riding in an automobile operated by such host must be made in time to afford the host a reasonable opportunity to avoid an accident, if such warning is to operate to the benefit of the guest. *Kiser v. Christensen* 155
18. What amounts to gross negligence in any given case must depend upon the facts and circumstances. The fact that the operator of the automobile may have been guilty of ordinary negligence is insufficient to warrant a recovery in favor of a guest. *Kiser v. Christensen* 155
19. In a negligence action, the burden is on the plaintiff to show that there was a negligent act or omission by the defendant and that it was the proximate cause of plaintiff's injury or a cause which proximately contributed to it. *Hansen v. Henshaw* 191
20. Negligence is a question of fact and may be proved

by direct or circumstantial evidence. *Hansen v. Henshaw* 191

21. Proof of negligence is sufficient if the facts and circumstances proved, together with the reasonable inferences which may be drawn therefrom, shall indicate with reasonable certainty the negligent act of which complaint is made. *Hansen v. Henshaw* 191

22. Duty of motorists stated where snowdrifts or other conditions have left only a narrow lane open for travel. *Pospichal v. Wiley* 236

23. When the driver of an automobile entering an intersection looks but fails to see an approaching automobile not shown to be in a favored position, the presumption is that the driver of the approaching automobile will respect his right-of-way. The question of his contributory negligence in proceeding to cross the intersection is a jury question. *Kohl v. Unkel* 257

24. If the driver of an automobile entering an intersection looks for approaching vehicles but fails to see one which is favored over him under the rules of the road, he is guilty of contributory negligence sufficient to bar a recovery as a matter of law. *Kohl v. Unkel* 257

25. An essential element necessary to be proved to entitle a passenger in an automobile to recover damages from the host on the ground of negligence less than gross is that he is a passenger for hire. *Lincoln v. Knudsen* 390

26. The substantive law of the case required that plaintiff prove that she was a passenger for hire, and not an invited guest, as a condition of the right to recover on account of negligence of the defendant less than gross. *Lincoln v. Knudsen* 390

27. Gross negligence within the meaning of the guest statute means great or excessive negligence. It indicates the absence of slight care in the performance of duty. *Lincoln v. Knudsen* 390
Calvert v. Miller 501

28. Ordinarily, the question of gross negligence is one of fact for a jury, but if the evidence respecting it is not in conflict or is so conclusive that ordinary minds may not draw different conclusions therefrom the question is one of law for the court. *Lincoln v. Knudsen* 390

29. Whether or not a certain course of conduct is negligence must be determined by the standards

fixed by law without regard to any private rules of the party charged therewith. *Fries v. Goldsby* 424

30. Ordinarily, contributory negligence is a question for the jury; but, where there is no basis in the evidence for a finding of contributory negligence, it is error to instruct on the subject and thereby to submit to the jury an issue which is outside the evidence. *Fries v. Goldsby* 424

31. In an action by the legal representative of a deceased guest against a host operator of an automobile, the plaintiff must prove by a preponderance of the evidence gross negligence and that it was the proximate cause of the accident. *Calvert v. Miller* 501

32. If the evidence in pending litigation respecting gross negligence is not in conflict, the question of its existence is one of law for the court. *Calvert v. Miller* 501

33. When the evidence is resolved most favorably toward the existence of gross negligence, and thus the facts are determined, the question of whether or not they support a finding of gross negligence is one of law. *Calvert v. Miller* 501

34. The operation of an automobile at a rate of speed prohibited by law is not in itself gross negligence. *Calvert v. Miller* 501

35. The violation of traffic regulations concerning speed, the giving of signals, or other similar regulations is not negligence as a matter of law of any kind or degree but it is a fact that may be considered with other evidence in the case in deciding an issue of negligence. *Calvert v. Miller* 501

36. When one suddenly moves from the place of safety into the path of a moving vehicle and is struck, his own conduct constitutes contributory negligence more than slight in degree, as a matter of law, and precludes recovery. *Farag v. Weldon* 544

37. The duty of a guest riding in an automobile is to use care in keeping a lookout commensurate with that of an ordinarily prudent person under like circumstances. *Bresley v. O'Connor Inc.* 565

38. Duty of guest riding in an automobile stated. *Bresley v. O'Connor Inc.* 565

39. Where there is no evidence to sustain a finding of contributory negligence, failure to submit such issue to the jury is not error. *Bresley v. O'Connor Inc.* 565

40. Where contributory negligence is charged against a plaintiff but the physical facts disclose conclu-

sively that he was not so guilty, it is error for the court to submit that question as an issue to the jury. The error is not prejudicial to the defendant making the charge, even if a phase thereof has been improperly defined. *Southwell v. DeBoer* 646

41. The elements of actionable negligence are a duty of the party charged with negligence to protect the injured party from injury, failure to satisfy that obligation, and injury resulting therefrom. *Wilson v. North Central Gas Co.* 664

42. A construction contractor is not liable for injuries or damage to a third person with whom he is not in contractual relation resulting from the negligent performance of his duty under his contract with the contractee where the injury or damage is sustained after the work is completed and accepted by the owner. *Wilson v. North Central Gas Co.* 664

43. In order to recover, the burden is on the plaintiff to establish that the contractor was in charge and control of the work at the time of the accident because of which the plaintiff seeks to recover damages from the contractor. *Wilson v. North Central Gas Co.* 664

44. The acceptance that is required by the proprietor of the work of a contractor, in order to relieve the contractor of liability for injury to a third person after the acceptance, is a practical acceptance after the completion of the work. A formal acceptance is not required. *Wilson v. North Central Gas Co.* 664

45. The term "unavoidable accident" means when an unexpected catastrophe occurs without any of the parties thereto being to blame for it. *Wright v. Lincoln City Lines, Inc.* 679

46. Where different minds may draw different conclusions from the evidence in regard to negligence, the question should be submitted to the jury. *Maska v. Stoll* 857

New Trial.

1. The trial court is authorized to grant a new trial upon timely appropriate motion being filed notwithstanding no preliminary motion for directed verdict has been made. *Kohl v. Unkel* 257

2. An order of the trial court overruling or sustaining a motion for a new trial must be made with the same solemnity as a judgment. It is the order which gives finality to the judgment. It goes to the

determination of a substantial right of the party. *Mueller v. Keeley* 613

3. Upon appeal from an order granting a new trial, the duty rests upon the appellee to point out the prejudicial error or errors which justify the ruling made. *Wright v. Lincoln City Lines, Inc.* 679
4. Errors sufficient to cause the granting of a new trial must be errors prejudicial to the rights of the unsuccessful party. *Wright v. Lincoln City Lines, Inc.* 679
5. Rule for consideration of case on appeal from an order granting a new trial stated. *Maska v. Stoll* 857

Officers.

1. A resident taxpayer of the state, without showing any interest or injury peculiar to himself, may enjoin illegal expenditures by a public board or officer. *Haynes v. Anderson* 50
2. The Auditor of Public Accounts and the State Treasurer are necessary parties to an action wherein the legality of expenditure of public funds in payment of the obligation of a contract with the state is brought into question. *Haynes v. Anderson* 50
3. A county treasurer is considered a ministerial officer. However, he may be vested with power and authority of a quasi-judicial character. *State ex rel. School Dist. v. Ellis* 86
4. The character of a duty as ministerial or discretionary must be determined by the nature of the act to be performed, and not by the office of the performer. *State ex rel. School Dist. v. Ellis* 86
5. When the law, in words or by implication, commits to any officer the duty of looking into facts, and acting upon them, not in a way which it specifically directs, but after a discretion in its nature judicial, the function is termed quasi-judicial. *State ex rel. School Dist. v. Ellis* 86
6. A county treasurer is not personally liable in a civil action brought to recover funds paid in lieu of taxes by a public power district, when such officer is required to determine facts and construe a statute to enable him to distribute such funds. He is, under the circumstances, exercising judgment and discretion and performing a quasi-judicial act. *State ex rel. School Dist. v. Ellis* 86
7. The office of county attorney is created by the Legislature in consequence of which it is to be treated

as a legislative office as distinguished from a constitutional office. *Fitzgerald v. Kuppinger* 286

8. The Legislature is without power to provide for the removal of a constitutional officer where the Constitution creates the office, fixes the term, and provides the grounds and manner of removal. *Fitzgerald v. Kuppinger* 286

9. It was intended by the Legislature that statute requiring earlier filing by incumbent should have application and reference to constitutional as well as statutory elective offices. *Fitzgerald v. Kuppinger* 286

10. The portion of legislative act under attack requiring earlier filing in primary by incumbent officers is unconstitutional as to constitutional officers. *Fitzgerald v. Kuppinger* 286

11. Legislative act requiring earlier filing in primary by incumbent officer, to the extent stated in this opinion, is invalid and incapable of enforcement as to statutory elective officers. *Fitzgerald v. Kuppinger* 286

12. The liability of a county clerk, if any, for erroneously issuing a certificate of title to a motor vehicle is for a failure to exercise due diligence in ascertaining if the facts recited in the application for a certificate of title are true. *Burns v. Commonwealth Trailer Sales* 308

13. The statutes of this state requiring official bonds of elected county officials require individual official bonds. *Foote v. County of Adams* 406

14. A blanket bond purporting to cover all elected county officers does not meet the standards required by the statutes. *Foote v. County of Adams* 406

Parties.

1. The Auditor of Public Accounts and the State Treasurer are necessary parties to an action wherein the legality of expenditure of public funds in payment of the obligation of a contract with the state is brought into question. *Haynes v. Anderson* 50

2. Parties who have entered into contracts with the state payable out of public funds are necessary parties to an action to have the contracts declared void and unenforceable. *Haynes v. Anderson* 50

Paupers.

1. There is no common-law liability upon any governmental unit to support poor and destitute per-

sons, and they are not a public charge unless made so by statute. *Marshall v. County of Nance* 252
2. A statute which expressly imposes the care of poor and destitute persons upon the county is ordinarily mandatory. *Marshall v. County of Nance* 252
3. Questions concerning the liability of a county for the relief of the poor involve the determination of facts by the county board by which any liability on the part of the county is fixed. *Marshall v. County of Nance* 252
4. Before a county can be held liable for the care of a poor person, it must be shown that the county board was given an opportunity to exercise its judgment and discretion in the matter by passing upon the facts necessary to determine the extent of the county's liability, if any. *Marshall v. County of Nance* 252

Pleading.
1. A motion to dismiss is not the proper mode of raising the defense of a former adjudication. *Schroeder v. Homestead Corp.* 43
2. A general demurrer admits all allegations of fact in the pleading to which it is addressed, which are issuable, relevant, material, and well pleaded; but it does not admit the pleader's conclusions of law or fact. *Boettcher v. County of Holt* 231
3. More than one defense may be interposed to the same cause of action if they are not inconsistent with each other. They are not inconsistent unless the proof of one necessarily disproves the other. *Giacomini v. Giacomini* 798
4. Generally, an answer setting up the statute of limitations and laches is not a technical plea of confession and avoidance. Whether an answer of a supposed estoppel is so or not depends upon the nature of the matter alleged in the plea. *Giacomini v. Giacomini* 798
5. A plea of estoppel in pais may be joined with a general denial when the averments by way of estoppel are not inconsistent with such denial. *Giacomini v. Giacomini* 798

Poisons.
Liability of person who knew or should have known of danger from leaving of poisonous substance on premises stated. *Colvin v. Powell & Co., Inc.* 112

Public Service Commissions.

1. Courts are without authority to interfere with the findings and orders of the State Railway Commission except where it exceeds its jurisdiction or acts arbitrarily. *Johnson v. Peake* 18
2. In a dispute between a shipper and a common carrier as to a tariff rate fixed by the State Railway Commission, an application by the shipper to the commission to determine the proper rate empowers the commission to determine the dispute. *Mefford v. Wilson Concrete Co.* 137
3. In a dispute between a shipper and a common carrier as to a tariff rate fixed by the State Railway Commission, an application by the carrier to the commission to determine the proper rate does not under the powers granted to the commission empower it to determine the dispute. *Mefford v. Wilson Concrete Co.* 137
4. A dispute between a shipper and a common carrier as to a tariff rate fixed by the State Railway Commission is determinable by the courts unless the shipper has invoked the power of the commission to make the determination. *Mefford v. Wilson Concrete Co.* 137
5. The procedure to obtain reversal, modification, or vacation of any order of the State Railway Commission is governed by the provisions in force with reference to appeals from the district courts to the Supreme Court. *Ruan Transport Corp. v. Peake, Inc.* 319
6. Where a motion for rehearing has been filed, the time for appeal runs from the date of the ruling of the State Railway Commission on the motion for rehearing. *Ruan Transport Corp. v. Peake, Inc.* 319
7. The time for appeal from the orders and rulings of the State Railway Commission to the Supreme Court is limited to 1 month from the date of the entry of the order or ruling to which complaint is made. *Ruan Transport Corp. v. Peake, Inc.* 319

Railroads.

The driver of an automobile who becomes frightened and bewildered at the discovery of the near approach of a train at a railroad crossing is not guilty of gross negligence toward his guest where the latter acquiesced in the method of operating the

automobile resulting in the creation of the danger. *Kiser v. Christensen* 155

Rape.

1. Rule as to degree of force required to constitute rape stated. *Brockman v. State* 171
Fulton v. State 759
2. The degree of resistance required of the prosecutrix is relative, depending upon the particular circumstances, but she must in good faith resist to the utmost of her physical ability as long as she has the power to do so until the offense is consummated. *Brockman v. State* 171
3. In a prosecution for rape it must be shown by competent evidence beyond a reasonable doubt not only that defendant committed the act charged but that he did so under such circumstances that every element of the alleged offense existed. *Brockman v. State* 171
4. In a prosecution for rape, after the prosecutrix has testified to the commission of the offense, it is competent to prove in corroboration of her testimony as to the main fact that within a reasonable time after the alleged outrage she made complaint to a person to whom a statement of such an occurrence would naturally be made. *Peery v. State* 628
5. The testimony concerning a complaint of being raped should, on direct examination, be confined to the fact that complaint was made. The details of the event, including the identity of the person accused, are not proper subjects of inquiry unless the complaint was a spontaneous, unpremeditated statement so closely connected with the act as to be part of the res gestae. *Peery v. State* 628
6. The court in a trial for rape should not inform the jury that such complaint is a corroborating circumstance but the jury should be permitted to give it such consideration and effect in that regard as it decides is proper in the circumstances of the case. *Peery v. State* 628
7. If the law requires corroboration of a witness, it must be accomplished by other evidence than that of the witness himself. His acts or statements do not constitute corroborative evidence. *Peery v. State* 628
8. In a prosecution for rape, if the prosecutrix testifies to the facts constituting the crime and the accused unequivocally denies the commission of the

offense, the testimony of the prosecutrix must be corroborated on material points by other evidence to justify or sustain a conviction of the accused. *Peery v. State* 628

9. It is not essential in a prosecution for rape that the prosecutrix be corroborated by other evidence as to the principal act constituting the offense, but it is indispensable that she be corroborated as to material facts and circumstances which tend to support her testimony as to the principal fact in issue. *Peery v. State* 628

10. In a prosecution for rape, competent evidence must show beyond a reasonable doubt that the defendant committed the act charged under such circumstances that every element of the alleged offense existed. Where the evidence fails to meet that test, it is insufficient to support a conviction. *Fulton v. State* 759

11. Where carnal knowledge is accomplished after a woman yields because of fear caused by threats of immediate great bodily injury or death, the consummated act is rape. *Fulton v. State* 759

12. In a prosecution for rape, an instruction which in general terms calls attention to the function of the jury as the trier of the facts, and directs that facts, circumstances, and considerations not disclosed by the record may not be taken into account, is sufficient as a cautionary instruction. *Fulton v. State* 759

Sales.

1. A manufacturer or other person owning or controlling a thing that is dangerous in its nature or is in a dangerous condition owes a legal duty to persons ignorant of the danger to use reasonable care to prevent injury. *Colvin v. Powell & Co., Inc.* 112

2. It is immaterial whether or not the conduct of the seller of a dangerous substance amounted to a breach of contract between him and the immediate buyer from him. The duty is not created by contract, but is an instance of the general human duty not to injure another through disregard of his safety. *Colvin v. Powell & Co., Inc.* 112

3. A restaurant owner engaged in serving food to paying guests for immediate consumption on the premises impliedly warrants that the food so served is wholesome and fit for human consumption. He is liable for injuries to such guests proximately

caused by a breach thereof without proof of negligence. *Zorinsky v. American Legion* 212

4. The time of delivery of the goods and the time of payment, if agreed upon in the oral contract must be referred to in the memorandum in writing required by the statute of frauds. *Ord v. Benson* 367
5. Where time of delivery of the goods and the time of their payment are not referred to in the oral agreement, the memorandum in writing required by the statute is sufficient without reference to such missing terms since the law implies the time of delivery and payment under the terms of the oral agreement and the memorandum as well. *Ord v. Benson* 367
6. Where a buyer wrongfully neglects or refuses to accept and pay for goods, the seller may maintain an action for damages for nonacceptance. Generally, the measure of damages is the difference between the contract price and the market value, if there is a market value, at the time fixed in the contract, or the refusal to accept. *Ord v. Benson* 367
7. A person who delivers merchandise in accordance with the provisions of a contract of sale theretofore duly entered into by the parties to the transaction is not an itinerant merchant within the meaning of the Itinerant Merchant Act. *Michaud v. State* 674

Schools and School Districts.

1. A school district must take into consideration money available from other sources in making a tax levy. The levy should be made for no more than will approximately raise the difference between the amount on hand and to be received from other sources, and the amount determined as necessary to meet the expenses of the district for the ensuing school year. *Kissinger v. School District No. 49* 33
2. Whether or not funds on hand or to be received from other sources result from taxation is not material if such funds are available for general school purposes for the ensuing year. *Kissinger v. School District No. 49* 33

Statutes.

1. The findings of the Legislature as set out in a declaration of policy contained in an act, while not absolutely controlling, are entitled to great weight

in determining the constitutionality of the act. *Omaha Parking Authority v. City of Omaha* 97

2. The Legislature may classify counties and cities when such classification rests upon some difference of situation or circumstance which calls for distinctive legislation for the class. The class must have a substantial quality or attribute which requires legislation appropriate or necessary for the counties and cities in the class and which would be inappropriate or unnecessary for those without the class. *Omaha Parking Authority v. City of Omaha* 97

3. The Legislature may classify the subjects, persons, or objects as to which it legislates if such classification rests upon differences in situation or circumstances between the things dealt with in one class and those dealt with in another. *Omaha Parking Authority v. City of Omaha* 97

4. When an act does not purport to be amendatory, but is enacted as original and independent legislation, and is complete in itself, it is not within the constitutional requirement as to amendments, though it may, by implication, modify or repeal prior acts or parts thereof. *Omaha Parking Authority v. City of Omaha* 97

5. If by a fair and reasonable construction the title calls attention to the subject matter of a legislative bill, it may be said that the object is expressed in the title. It need not be a complete abstract of the contents of the bill. *Omaha Parking Authority v. City of Omaha* 97

6. A statute does not change the common law beyond what is clearly expressed in the statute. *Platte Valley P. P. & I. Dist. v. County of Lincoln* 196

7. Statute imposing duties on drainage districts and counties in construction and maintenance of highways is in conflict with the common law and must be strictly interpreted. *Platte Valley P. P. & I. Dist. v. County of Lincoln* 196

8. Where the intent of the Legislature in the enactment of legislation is clearly expressed the courts are in duty bound to accept that expression. *Fitzgerald v. Kuppinger* 286

9. It is not within the province of the courts to read a meaning into a statute which is not warranted by the legislative language. *Fitzgerald v. Kuppinger* 286

10. In the legislative domain and within constitutional

bounds the Legislature is supreme. *Fitzgerald v. Kuppinger* 286

11. Where a legislative enactment is clear, explicit, and unambiguous in the expression of intent and meaning, resort may not be had to contemporaneous construction or information to ascertain the intent of the Legislature. *Fitzgerald v. Kuppinger* 286

12. If a portion of a legislative act is unconstitutional and the portion of the act cannot be separated from the other portion or portions and the latter enforced independent of the former, and it further appears that the unconstitutional part constituted such an inducement to the passage of the other parts that they would not have been passed without it, the entire act will fail. *Fitzgerald v. Kuppinger* 286

13. It was intended by the Legislature that the legislation should affect alike constitutional and statutory elective officers and that thus by a disclosed inseparable intention an inducement which invalidated the entire provision was present. *Fitzgerald v. Kuppinger* 286

14. If an act of the Legislature is constitutional in part and unconstiutional in part, the part which is constitutional may not be enforced unless it may be separated in such manner as to leave an independent statute capable of enforcement. *Fitzgerald v. Kuppinger* 286

15. Legislative act requiring earlier filing in primary by incumbent officer, to the extent stated in this opinion, is invalid and incapable of enforcement as to statutory elective officers. *Fitzgerald v. Kuppinger* 286

16. The time within which an act is to be done is computed by excluding the first day and including the last; if the last be Sunday, it is excluded. *Ruan Transport Corp. v. Peake, Inc.* 319

17. Statute prescribing method for computation of time establishes a uniform rule applicable alike to the construction of statutes and to matters of practice. *Ruan Transport Corp. v. Peake, Inc.* 319

18. The term calendar month, whether employed in statutes or contracts, and not appearing to have been used in a different sense, denotes a period terminating with the day of the succeeding month numerically corresponding to the day of its beginning, less one. If there be no corresponding day of the succeeding month, it terminates with the last day thereof. *Ruan Transport Corp. v. Peake, Inc.* 319

19. In construing statutes and ascertaining the intent of the legislative branch of the government, the courts will take into consideration the settled practices of a legislative body. *Foote v. County of Adams* 406
20. Courts should give to statutory language its plain and ordinary meaning. *Foote v. County of Adams* 406
21. Statutes pertaining to the same subject matter should be construed together, and this is particularly true if the statutes were passed at the same session of the Legislature. *Mueller v. Keeley* 613
22. A person who delivers merchandise in accordance with the provisions of a contract of sale theretofore duly entered into by the parties to the transaction is not an itinerant merchant within the meaning of the Itinerant Merchant Act. *Michaud v. State* 674
23. Common law of England, when not inconsistent with the Constitution or statutes, is in force in this state. *Timmerman v. Timmerman* 704
24. The revocation of a license to operate a motor vehicle in this state under the point system provided by statute is not an added punishment for the offense or offenses committed as a result of which the points are accumulated. *Durfee v. Ress* 768
25. The purpose of the revocation of a license is to protect the public, and not to punish the licensee. *Durfee v. Ress* 768
26. Rule for construction of statutes as a whole stated. *Belgum v. City of Kimball* 774
27. It is a cardinal rule of construction of statutes that effect must be given, if possible, to the whole statute and every part thereof. It is the duty of the court, so far as practicable, to reconcile the different provisions so as to make them consistent, harmonious, and sensible. *Belgum v. City of Kimball* 774
28. When a statute or a city ordinance is ambiguous or susceptible of two constructions, one of which creates absurdities, unreasonableness, or unequal operation and the other of which avoids such a result, the latter should be adopted. *Maska v. Stoll* 857

Taxation.

1. A school district must take into consideration money available from other sources in making a tax levy. The levy should be made for no more than will approximately raise the difference between the amount on hand and to be received from other sources, and

the amount determined as necessary to meet the expenses of the district for the ensuing school year. *Kissinger v. School District No. 49* 33

2. Whether or not funds on hand or to be received from other sources result from taxation is not material if such funds are available for general school purposes for the ensuing year. *Kissinger v. School District No. 49* 33

3. A county treasurer is not personally liable in a civil action brought to recover funds paid in lieu of taxes by a public power district, when such officer is required to determine facts and construe a statute to enable him to distribute such funds. He is, under the circumstances, exercising judgment and discretion and performing a quasi-judicial act. *State ex rel. School Dist. v. Ellis* 86

4. A levy of taxes authorized by law is not invalid because of the name by which the tax is designated in making the levy if the statute under which it is made does not attach a name to the tax by which it is required to be designated. *Satterfield v. Britton* 161

5. A taxpayer, who voluntarily pays an unauthorized and illegal tax and who does not make a demand for its return within 30 days of the time of the payment of the tax, is forever barred and has no capacity to contest the validity of the tax by any legal proceeding. *Satterfield v. Britton* 161

6. If a county assessor performs the duties in fixing the value of property in the manner required of him by law, the fact that in the performance of the duties he resorted to recommendations and evidence furnished by an appraisal committee does not affect the validity of the assessment. *Boettcher v. County of Holt* 231

7. If a county assessor fails to make an inspection of real estate and relies upon and accepts for assessment purposes the valuation of an appraiser, the assessment is not void and no ground is afforded for injunctive relief. *Boettcher v. County of Holt* 231

8. Where the complaint of a taxpayer is based upon irregularities as distinguished from incidents rendering the tax void, the remedy of the taxpayer is not by injunction but by resort in the first instance to the board of equalization. *Boettcher v. County of Holt* 231

9. The legislative power and authority delegated to a city to construct local improvements and levy as-

sessments for payment thereof is to be strictly construed, and every reasonable doubt as to the extent or limitation of such power and authority is resolved against the city and in favor of the taxpayer. *Chicago, St. P., M. & O. Ry. Co. v. City of Randolph* 687

10. The streets of a city of the second class or village can be paved and paid for only by legally following one of the three factually applicable methods provided by statute. *Chicago, St. P., M. & O. Ry. Co. v. City of Randolph* 687

11. The power of a city council to make paving improvements is circumscribed by the statute, and unless the city council conforms to one of the three prescribed methods, it is without power to lawfully bind property to pay for such improvements. *Chicago, St. P., M. & O. Ry. Co. v. City of Randolph* 687

12. The methods prescribed by statute granting to cities of the second class and villages, power to pave, gravel, and improve streets are mandatory and jurisdictional, and unless the governing boards of such municipalities act within one of the three prescribed methods, no valid assessment can be made against property to pay the costs of such improvement. *Chicago, St. P., M. & O. Ry. Co. v. City of Randolph* 687

13. The publications and notices provided by statute are mandatory and jurisdictional steps without which an ordinance never becomes effective. *Chicago, St. P., M. & O. Ry. Co. v. City of Randolph* 687

14. If the applicable law prescribes the mode of exercising the power, the mode prescribed must be followed or the assessment will be void. *Chicago, St. P., M. & O. Ry. Co. v. City of Randolph* 687

15. Special assessments made upon property without compliance with jurisdictional requirements are void as distinguished from irregular. *Chicago, St. P., M. & O. Ry. Co. v. City of Rnadolph* 687

16. Special improvements cannot be ordered except in the manner provided by statute. *Chicago, St. P., M. & O. Ry. Co. v. City of Randolph* 687

17. The power to construct improvements and levy assessments for benefits is a power limited to and must be exercised within the district created. *Chicago, St. P., M. & O. Ry. Co. v. City of Randolph* 687

18. When a party attacks a paving assessment for the reason that it is illegal or for an unauthorized

purpose, the burden is on him to prove the invalidity of the assessment or that it was for an unauthorized purpose. *Chicago, St. P., M. & O. Ry. Co. v. City of Randolph* 687

Tenancy in Common.

1. The fact of cotenancy alone does not create a fiduciary relationship as to the property owned by the cotenants; but if one cotenant has possession of property or funds belonging to his cotenant, he becomes trustee thereof and stands in a fiduciary relationship to a cotenant with respect thereto to the extent of the interest of the cotenant who may compel an accounting. *Hafeman v. Gem Oil Co.* 438
2. A tenant in common of oil underlying land which has been extracted by a cotenant is entitled to an accounting from the cotenant who produced the oil for the value of the ownership of the tenant in common in the oil. *Hafeman v. Gem Oil Co.* 438

Torts.

In an action for personal injury, plaintiff may recover all the damages proximately caused by the tort under a general allegation of the gross amount of damages caused, including damages for impairment of his capacity to earn money. *Jacobsen v. Poland* 590

Trial.

1. The proof in a trial of a jury case must be confined to legal evidence tending to prove or disprove an issue made by the pleadings. The admission of improper evidence is prejudicial if it may have influenced the verdict. *Lane v. Burt County Rural Public Power Dist.* 1
2. Evidence wrongfully admitted must be considered prejudicial unless it appears that such admission did not affect the result of the trial unfavorably to the party complaining. *Lane v. Burt County Rural Public Power Dist.* 1
3. Rule for consideration of motion for directed verdict stated. *Dryer v. Malm* 72
   Colvin v. Powell & Co., Inc. 112
   Kohl v. Unkel 257
   Lincoln v. Knudsen 390
4. In an action wherein there is any evidence which will support a finding for a party having the bur-

den of proof, the trial court cannot disregard it and direct a verdict against him. *Dryer v. Malm* 72

5. In a negligence case, where different minds may reasonably draw different conclusions or inferences from the evidence adduced, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury. *Dryer v. Malm* 72
Colvin v. Powell & Co., Inc. 112

6. It is error for the trial court to submit to the jury an issue pleaded by the plaintiff which under the evidence affords no basis for recovery. *Van Wye v. Wagner* 205

7. If it does not appear from the record that an incorrect instruction to the jury did not affect the result of the trial of the case unfavorably to the party affected by it, the giving of the instruction must be considered prejudicial error. *Van Wye v. Wagner* 205

8. It is error without prejudice to instruct on questions not raised by pleadings or applicable evidence when the instructions do not have a tendency to mislead the jury. *Van Wye v. Wagner* 205

9. A judgment of the district court is presumed to be correct, and a party assailing the correctness of it must assume the burden of pointing out specifically the rulings of which he complains and the mistake made by the court. *Van Wye v. Wagner* 205

10. It is the duty of the trial court, without request, to instruct the jury on each issue presented by the pleadings and supported by evidence. *Zorinsky v. American Legion* 212

11. A litigant is entitled to have the jury instructed as to his theory of the case as shown by pleading and evidence, and a failure to do so is prejudicial error. *Zorinsky v. American Legion* 212

12. Where the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question, as a matter of law, rather than submit it to a jury for determination. *Borsen v. Moskowitz* 223
Kohl v. Unkel 257
Farag v. Weldon 544

13. In testing the sufficiency of evidence to support a verdict, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor and he

should have the benefit of every inference that can reasonably be deduced therefrom. *Pospichal v. Wiley* 236
Kohl v. Unkel 257
Jensen v. Priebe 481
Maska v. Stoll 857

14. Where different minds may reasonably draw different conclusions from the evidence, or where there is a conflict in the evidence, as to whether or not negligence or contributory negligence has been established, the question is for the jury. *Pospichal v. Wiley* 236

15. The refusal of the trial court to permit the jury to view the premises involved in the litigation is not reversible error in the absence of an abuse of discretion. *Pospichal v. Wiley* 236

16. Where a verdict is returned against a plaintiff and in favor of several defendants, on different, distinct, and separate defenses pleaded separately by them, a single joint motion for a new trial against them all is insufficient, and it should be overruled if the verdict is good as to any one of the defendants. *Pospichal v. Wiley* 236

17. A motion for directed verdict is an absolute prerequisit to a motion for judgment notwithstanding the verdict. The trial court cannot set aside a verdict and enter a judgment notwithstanding the verdict, where no preliminary motion for a directed verdict has been made. *Kohl v. Unkel* 257

18. The trial court is authorized to grant a new trial upon timely appropriate motion being filed notwithstanding no preliminary motion for directed verdict has been made. *Kohl v. Unkel* 257

19. Where a joint motion for a directed verdict is made by a plaintiff against several defendants, the motion should be overruled if the motion is not good as to any one of the defendants. *Burns v. Commonwealth Trailer Sales* 308

20. When it appears from the record that the verdict in a case is so clearly exorbitant or excessive as to indicate that it was the result of passion, prejudice, or mistake, or some means not apparent in the record, or it is clear that the jury disregarded the evidence or rules of law, then it is the duty and power of the trial court and of the Supreme Court to set aside a verdict for damages so large that it

does not find support in the evidence. *Paddack v. Patrick* 355

21. The burden of proof means the duty resting on one party or the other to establish by a preponderance of the evidence an issue essential to recovery. *Lincoln v. Knudsen* 390

22. The burden of proof never shifts nor changes from the first to the last where it is placed by the pleadings or the substantive law of the case. *Lincoln v. Knudsen* 390

23. Ordinarily, the question of gross negligence is one of fact for a jury, but if the evidence respecting it is not in conflict or is so conclusive that ordinary minds may not draw different conclusions therefrom the question is one of law for the court. *Lincoln v. Knudsen* 390

24. The proof in a trial of a jury case must be confined to legal evidence tending to prove or disprove an issue made by the pleadings, and the admission of improper evidence is prejudicial error if it may have influenced the verdict. *Fries v. Goldsby* 424

25. If it does not appear from the record that evidence wrongfully admitted in the trial of a jury case did not affect the result of the trial unfavorably to the party against whom it was admitted, its reception must be considered prejudicial error. *Fries v. Goldsby* 424

26. The court should submit to the jury only such issues as find some support in the evidence, and where an issue is submitted without support in the evidence which is calculated to mislead the jury in the consideration of the facts to the prejudice of the complaining party, the judgment must be reversed. *Fries v. Goldsby* 424

27. Rule for consideration of sufficiency of evidence to sustain a verdict stated. *Farag v. Weldon* 544

28. To justify the direction of a verdict, it is not necessary that there should be literally no evidence to go to the jury. It is sufficient if there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established. *Farag v. Weldon* 544

29. Where there is no evidence to sustain a finding of contributory negligence, failure to submit such issue to the jury is not error. *Bresley v. O'Connor Inc.* 565

30. A verdict may be set aside as excessive only when

it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, or mistake, or that the jury clearly disregarded the evidence or controlling rules of law. *Bresley v. O'Connor Inc.* 565

31. Instructions given to a jury must be construed together, and if, when considered as a whole, they properly state the law, it is sufficient. *Bresley v. O'Connor Inc.* 565

32. It is for the jury to determine controverted issues of fact in a law action if the evidence is in dispute. *Jacobsen v. Poland* 590

33. The future pain and suffering which a jury is entitled to consider in the assessment of damages are such as the evidence shows with reasonable certainty will be experienced by the injured person. *Jacobsen v. Poland* 590

34. A party to an action is entitled to have the jury instructed with reference to his theory of the case, whether requested to do so or not, when the pleadings present the theory as an issue and it is supported by competent evidence. *Southwell v. DeBoer* 646

35. Conflicting instructions on issues the effect of which may be to mislead or confuse the jury are erroneous and prejudicial. *Southwell v. DeBoer* 646

36. Where the verdict in an action for personal injuries is challenged on appeal solely because it is excessive, it will not be disturbed by the reviewing court, unless it can say as a matter of law that, upon consideration of all the evidence, the amount of such verdict is excessive. *Southwell v. DeBoer* 646

37. A verdict may be set aside as excessive by the trial court or on appeal only when it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, mistake, or some means not apparent in the record, or it is clear that the jury disregarded the evidence or rules of law. *Southwell v. DeBoer* 646

38. Where a party is successful in securing the verdict of a jury, he has the right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured. *Wright v. Lincoln City Lines, Inc.* 679

39. The alleged errors that may be considered by the district court are those which are called to its attention by motion or other appropriate pleading. *Wright v. Lincoln City Lines, Inc.* 679

40. Where an instruction, although erroneous, is not

prejudicially so, it is not legal cause or reason for granting a new trial. *Wright v. Lincoln City Lines, Inc.* 679

41. Instructions should be read and construed together, and, if as a whole they state the law correctly, they will be held sufficient, although one or more of them, considered separately, may be subject to just criticism. *Wright v. Lincoln City Lines, Inc.* 679

42. Proper course of procedure to raise question of misconduct of attorney in arguing case to a jury stated. *Sandomierski v. Fixemer* 716

43. One may not complain of the misconduct of counsel if with knowledge of such misconduct he does not ask for a mistrial, but consents to take the chances of a favorable verdict. *Sandomierski v. Fixemer* 716

44. Objections at the close of the argument, to the misconduct of an attorney in arguing a case to a jury, are timely made. *Sandomierski v. Fixemer* 716

45. Where the argument of counsel is not being fully reported, it is proper practice to call the reporter and make a record of the improper statements by counsel. All that is required is that an accurate record be made under the supervision of the court, which will appear in the bill of exceptions. *Sandomierski v. Fixemer* 716

46. In an argument to a jury, the making of statements having no support in the evidence, that the defendant would not have to pay the judgment because he was indemnified in some manner, is such misconduct of counsel as will ordinarily require a reversal. *Sandomierski v. Fixemer* 716

47. Where improper argument to a jury is calculated to distract its attention from the issues and evidence and to induce a larger verdict by injecting prejudicial statements, the verdict cannot be sustained. *Sandomierski v. Fixemer* 716

48. Generally, the burden of proof is upon one seeking to establish and enforce either a resulting or constructive trust to prove the same by a preponderance of evidence which is clear, satisfactory, and convincing in character. *Giacomini v. Giacomini* 798

49. If it is clear that a verdict is excessive and there is no method by which the court can ascertain the extent of the excess, a remittitur may not be properly required. *Bitler v. Terri Lee, Inc.* 833

50. Where different minds may draw different conclusions from the evidence in regard to negligence, the

question should be submitted to the jury. *Maska v. Stoll* 857

51. It is the duty of the trial court, without request, to instruct the jury on each issue presented by the pleadings and supported by evidence, and a failure to do so is prejudicial error. *Maska v. Stoll* 857

Trusts.

1. Laches and the statute of limitations will generally begin to run between a trustee and beneficiary of an express or voluntary trust when the trust terminates by its own limitations or the trustee repudiates the trust by the assertion of an adverse claim to or ownership of the trust property. *Dewey v. Dewey* 296
2. Repudiation of a trust may be proved either by actual knowledge by or notice thereof to the beneficiary, or by open, notorious, and unequivocal facts and circumstances from which a beneficiary who is not under any recognized disability would be put on notice that the trust has been repudiated and require him to timely assert his equitable rights. *Dewey v. Dewey* 296
3. Whether or not such facts and circumstances are consistent with continuance of the trust or indicate an intent to repudiate and claim adversely is a question of fact for determination by the court in each individual case. *Dewey v. Dewey* 296
4. Generally, the burden of proof is upon one seeking to establish and enforce either a resulting or constructive trust to prove the same by a preponderance of evidence which is clear, satisfactory, and convincing in character. *Giacomini v. Giacomini* 798

Waters.

1. An owner of land may control surface water on his own land and refuse to receive any that flows from adjoining land. His right in this respect however must be so exercised as not to unnecessarily or negligently cause injury to the rights and property of others. *Elsasser v. Szymanski* 65
2. The term lake comprehends a reasonably permanent body of water substantially at rest in a depression on the surface of the earth. *Block v. Franzen* 270
3. A lake is distinguished from a stream by the fact that in the former the body of water is substantially at rest while in the latter it has a perceptible flow. *Block v. Franzen* 270

4. Surface waters comprehend waters from rains, springs, or melting snows which lie or flow on the surface of the earth but which do not form part of a watercourse or lake. *Block v. Franzen* 270
5. The principles of law applicable to waters in lakes are similar to those applicable to waters in watercourses. *Block v. Franzen* 270
6. The owner of a lake wherein the surface water from the surrounding land accumulates, and from which it has no means of escape except by evaporation or percolation, cannot lawfully, by means of a ditch or dike, discharge such water upon the land of his neighbor without his consent to his injury. *Block v. Franzen* 270
7. By statute, all appropriations for water must be used for some beneficial or useful purpose, and when the appropriator or his successor in interest ceases to use it for such purpose, the right ceases. *State v. Nielsen* 372
8. The Department of Roads and Irrigation has the authority to cancel a water appropriation where the same has not been used for some beneficial or useful purpose, or having been so used at one time has ceased to be used for such purpose for more than 3 years. *State v. Nielsen* 372
9. Irrigation rights may be lost by abandonment or nonuser of such rights for the period of statutory limitations relating to real estate. *State v. Nielsen* .. 372
10. Nonuser must be continued for a time equal to the statutory limitation upon actions to recover the possession of real property in order to lose the right of appropriation. *State v. Nielsen* 372

Wills.

1. Issues of fact in will contest cases are determined in the Supreme Court by the sufficiency of the evidence to sustain the verdict of the jury or the findings of the district court. Where the evidence in a case tried to the jury is conflicting, issues of fact are questions for its determination. *Jensen v. Priebe* 481
2. A provision in a will, made subsequent to the execution of a deed, indicating that the property involved had been conveyed, is a circumstance that properly may be considered with all the other facts and circumstances in determining whether or not there had been a delivery of the deed. *Short v. Kleppinger* 729

Witnesses.

1. A duly licensed and practicing chiropractor is competent to testify as an expert witness within the scope of his knowledge according to his qualifications in the field of chiropractics. The weight of his testimony is a question for the jury. *Fries v. Goldsby* 424
2. When appropriate foundation is laid, X-ray pictures are admissible in evidence and subject to interpretation by an expert witness for the purpose of showing the condition of the internal tissues of the body. *Fries v. Goldsby* 424
3. A witness having a direct legal interest may testify to a conversation in which the witness took no part between the deceased and another person. *Short v. Kleppinger* 729
4. An attorney who prepared a deed at the request of the grantor and who was present at the time of its execution and delivery is competent to testify to factual matters concerning the preparation, execution, and delivery of the deed. *Short v. Kleppinger* 729
5. Only confidential communications to one's attorney are protected by statute. The privilege does not extend to communications made in the presence of others or mere directions given to an attorney acting as scrivener in preparation of instruments. *Short v. Kleppinger* 729

Workmen's Compensation.

1. A latent injury, progressive in character, which results in compensable disability, occurs when the condition produced by the injury culminates in disability of the employee. *Hauff v. Kimball* 55
2. If an occupational disease results from continual or repeated inhalation of small quantities of a deleterious substance over a period of time, an afflicted employee is injured when the accumulated effects of the substance manifest themselves by causing disability of the employee, and the time of the injury is when disability is first experienced by the employee. *Hauff v. Kimball* 55
3. The Workmen's Compensation Act provides benefits on account of the death of an employee caused by an occupational disease arising out of and in the course of the employment for the use of the dependents of the employee. *Hauff v. Kimball* 55
4. It is the practice of the Supreme Court in all cases under the Workmen's Compensation Act to avoid

rules of technical interpretation as much as is possible and to determine the intention of the Legislature from the language of the act as a whole rather than from loose words or phrases of isolated paragraphs. *Hauff v. Kimball* 55

5. The rules of law which are applicable and controlling in this case appear in Feagins v. Carver, 162 Neb. 116, 75 N. W. 2d 379. *Haufe v. American Smelting & Refining Co.* 329

6. As used in the Workmen's Compensation Act, the term continuous employments relates to the contract of hiring and is applicable to those situations where the relationship of employer and employee is a continuing one. *Newberry v. Youngs* 397

7. Under the Workmen's Compensation Act, the employer is liable for reasonable medical and hospital services, including the cost of travel incident to and reasonably necessary for obtaining such services. *Newberry v. Youngs* 397

8. The burden placed upon the employer of furnishing necessary medical services is designed to relieve or cure the physical injuries suffered by the employee. *Newberry v. Youngs* 397

9. The Workmen's Compensation Act is to be liberally construed to the end that its beneficent purposes may not be thwarted by technical refinement of interpretation. *Haler v. Gering Bean Co.* 748

10. Total disability under the Workmen's Compensation Act is defined. *Haler v. Gering Bean Co.* 748

11. A workman who, solely because of his injury, is unable to perform or to obtain any substantial amount of labor, either in his particular line of work, or in any other for which he would be fitted except for the injury, is totally disabled within the meaning of the workmen's compensation law. *Haler v. Gering Bean Co.* 748

12. A claimant for compensation, who through an injury has suffered a permanent partial loss of the use or function of two members, is entitled to recover such proportion of the compensation allowed for total disability as the extent of his loss would bear to the total loss of such members. *Haler v. Gering Bean Co.* 748

13. In establishing a schedule of benefits for injury to specific parts of the body, it was the intention to fix the amount of such benefits without regard to the extent of the subsequent disability with respect

to the particular work or industry in which the employee was engaged at the time of his injury. *Haler v. Gering Bean Co.* 748

14. Where an employee has suffered an injury to some particular member or members and some unusual extraordinary condition develops therefrom as a result thereof, which condition affects some other member or the body itself, an increased award is proper and should be made to cover such additional disability. *Haler v. Gering Bean Co.* 748

15. Rule for allowance of attorney's fee in workmen's compensation cases stated. *Haler v. Gering Bean Co.* 748